(20,674.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 286.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE A. SOWERS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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1 *Caption.*

STATE OF TEXAS:

At a term of the Honorable Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, Honorable J. H. James, Chief Justice, presiding, beginning on the 1st. day of October, A. D., 1906, the following styles cause came on to be heard:—

No. 3596.

A., T. & S. F. RY. CO., Appellant,
vs.
GEORGE B. SOWERS, Appellee.

Appealed from the District Court of El Paso County.

2 STATE OF TEXAS, *County of El Paso:*

At a Term of the District Court begun and holden at El Paso, within and for the County of El Paso, before the Honorable J. M. Goggin, Judge Presiding.

Beginning on the 6th day of November, A. D., 1905, and ending on the 31st day of December, A. D., 1905.

The following proceedings were had, to-wit:

No. 5710.

GEORGE A. SOWERS, Plaintiff,
vs.
A., T. & S. F. Ry. Co., Defendant.

3 *Plaintiff's First Amended Original Petition.*

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1905.

5710.

GEORGE A. SOWERS, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO., Defendant.

To the Honorable Judge of said Court:

Your petitooner, George A. Sowers, hereinafter styled Plaintiff, complaining of the Atchison, Topeka & Santa Fe Ry. Co., hereinafter styled Defendant, after leave of Court first had and obtained, filed this his First Amended Original Petition, and for amendment and cause of action respectfully represents and shows to the Court:—

That Plaintiff resides at Winslow, Arizona; that defendant is a foreign corporation, duly and legally incorporated and has and maintains an office and local Agent in El Paso County, Texas; that heretofore, to-wit:—On and prior to the 30th day of April, 1905, said Defendant Company owned and operated a line of Railway extending from Gallup, New Mexico, through the Territory of New Mexico and into the City and County of El Paso, and State of Texas, and is and was a common carrier of freight and passengers for hire, and operated upon and over its aforesaid line of railway a large number of engines, cars and employed a large number of engineers and brakemen and other employees, whose business it was to run and operate its engines and trains in the usual course of business conducted by said defendant company; that said defendant also owned, maintained and operated a large number of side tracks, and switch tracks at different points on its line of railway, one of which was situated at Gallup, New Mexico; that on and prior to the 30th day of April, 1905, plaintiff was employed by defendant as brakesman on a freight train; that on or about the 30th day of April, 1905, while employed by said defendant company, and while engaged in the business incident to his employment, he met with an accident and was seriously injured without any fault or contributory negligence on his part; that on or about said 30th day of April, 1905, he was ordered by said defendant Company to assist some other em-

ployees in operating an engine through defendant's yards at
4 Gallup, New Mexico, and over what is known as track No. 5; that in order to place said engine on the Main line it became necessary to open a large number of switches, and for this purpose—plaintiff was ordered, and it was a part of his duty under his employment, to open the switches and allow said engine to leave track No. 5 and get on to the Main line, and in order to properly do his duty and in the usual and customary manner and way, plaintiff mounted the pilot of said engine in order to ride through the yards, and be in a position to get down and through all switches with the greatest dispatch; and plaintiff says that while he was riding on the pilot of said engine at or about One o'clock A. M. April 30th, 1905, the pilot struck and came in contact with the frog or guard rail, and by reason of the pilot striking said frog or guard rail, or some other substance, his foot was caught by said pilot and against said frog or guard rail or by the wheels of said engine and was so badly injured and mangled that it became necessary to amputate same near the instep, thus rendering him a cripple for life. Plaintiff says that said track No. 5 and more particularly all that portion or part of said track at and adjacent to said frog, was out of order, unsafe and dangerous, substantially as follows, to-wit:

That at the time and long prior to said accident it had been raining at Gallup, New Mexico, and large quantities of water had run on to said Track No. 5, causing said track to become very wet and soft; that the road bed on which said track No. 5 was laid was not properly ballasted but had been laid on soft cinders, and was not properly tamped underneath and against the ties; that for some unknown cause said track was uneven, and very rough and con-

tained what is known as low joints; that said low joints were caused by the dirt not being properly tamped under the ties and by reason of the roadbed being soft, and the dirt rolling out from underneath the ties and allowing the ties to fall on a lower level than the other ties causing the track to be lower at this place, and known by railroad men as a low joint; that one of said low joints was at or near said frog, and at the place where plaintiff met his accident. Plaintiff says that when said engine was moving across said track, and when the wheels struck said low joint, it allowed the cowcatcher to fall down and strike on or against said frog or guard rail or some other obstruction, and plaintiff's foot was in some manner caught by the pilot against said frog or guard rail, or by the wheels of said engine after said pilot struck said frog and guard rail, and plaintiff was injured as aforesaid;

In addition to the aforesaid grounds of negligence plaintiff says that he has reason to believe and does believe and here alleges that said pilot was maintained on said engine too low, or lower than the pilots are ordinarily maintained on engines; that said frog or guard rail was too high, thus causing said pilot and guard rail or frog to strike each other while the engine was being run over this track;

Plaintiff avers and charges that in order for him to do his work without delay it was necessary, as well as the usual and customary practice for all the trainmen to ride on the pilot of said engine while going through the yards, and that while riding on said pilot and standing in the position in which he was standing at the time of said accident, he was acting in the line of his duties and in the scope of his employment as brakeman on said engine; that it was the duty of said defendant company to furnish for plaintiff's use a reasonably safe and suitable track and roadbed as well as a reasonably safe and suitable engine and all appliances thereon, and to test and inspect said track and engine or cause the same to be tested, inspected and repaired, and kept in a reasonable safe condition, and to keep said track and roadbed free from all obstructions, but plaintiff avers and charges that said defendant company, its servants, agents and employees, disregarding the rights and duties that they owed to plaintiff, and all other employees, negligently and carelessly failed to provide him with a reasonably safe engine and appliance thereon and reasonably safe roadbed or sidetrack, free from all obstructions, but negligently and carelessly allowed said side track to become out of repair, and allowed the water to fall in and on same and allowed the roadbed to become very wet and soft and allowed said track to be rough and uneven, and permitted it to so become out of repair so as to cause a large number of low joints, or low places in the track and placed and maintained said frog too high and allowed said pilot on said engine to fall down and remain lower than was reasonable necessary, and also allowed some obstruction to be placed and maintained on said track; that said defendant company, its servants, agents and employees were guilty of negligence in allowing said engine and track to be and remain in the aforesaid unsafe and dangerous condition, and that said negligence and negligent acts and omissions on the part of said defendant com-

pany and its duly authorized agents was the direct and consequent cause of plaintiff's accident and his consequent injuries;

Plaintiff avers and charges that if said track had been in a reasonably safe condition, had not been wet and soft, or if the track and ties had been laid on a good and sufficient road bed, and had been properly surfaced and the dirt tamped underneath the ties, or if said track had not had low joints, or if said pilot had been properly and sufficiently maintained on said engine, said accident would not have occurred; that on account of the great weight of said engine when it struck that part of the track that was soft and wet and particularly when the wheels struck said low joint, it caused the ties and rails to sink in the soft earth and to fall down in said low joints, which caused said pilot to fall down toward the rails, and so low as to strike against said frog or guard rail in the manner above set out, and before plaintiff could get into a place of safety he was caught and injured as above mentioned; that said defendant company, its servants, agents and employees, at the time and long prior to said accident knew of the aforesaid defective, unsafe and dangerous conditions of said track and roadbed, engine and pilot, or could have known of same by the exercise of ordinary care and inspection;

Plaintiff says that he was ignorant of all of the aforesaid defects in said engine, track or roadbed and on account of the darkness of the night, could not see any of same by the exercise of ordinary care; that his injuries were caused wholly by the negligence and carelessness of said defendant company as above set out; plaintiff says that on or about the 29th day of June, 1905, he made out a statement in writing setting out, as nearly as he could, the manner and way in which he met his accident as above specified and the causes of same as nearly as he then knew, with the names of all the witnesses to the happening of said accident or knew of his injuries and swore to same before a Notary Public of the Territory of New Mexico, which said notice was addressed to this defendant, and which was by this plaintiff delivered to said defendant's agent at Gallup, New Mexico; a copy of which is hereto attached and made a part of this petition — possession of said defendant company, its servants, agents and attorneys; and notice is hereby given to produce
7 said original notice on the trial of this cause, or secondary evidence will be introduced to prove the contents thereof;

That by reason of the aforesaid injuries received to his foot it become necessary to amputate same near the instep, and that by reason of said injury he has suffered and will continue to suffer during the remainder of his life great bodily pain and mental anguish, and his ability to earn a living has been greatly impaired and will so continue impaired during the remainder of his life; as a result of his said accident and injuries received he is wholly incapacitated from following his business of railroading, in which he is skilled; that he has no other business or employment, and for this reason has suffered great pecuniary loss; that at the time of said accident he was earning the sum of one hundred dollars per month, which

earning capacity would have increased with his experience and years; he was twenty-six years of age, a strong, healthy, able-bodied man.

Plaintiff says by reason of the premises and all the aforesaid facts he has been injured in the total sum of twenty thousand dollars;

Wherefore, all parties being before this court, plaintiff prays that on final hearing he have judgment for his damages and costs of suit.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

GALLUP, *June* 29, 1905.

Received of Geo. A. Sowers a notice in regard to happening to him on April 30th, 1905, at Gallup, N. M.

N. J. HUDSON.

The Territory of New Mexico to the Atchison, Topeka & Santa Fe Railway Company, and its officers and Agents located in the Territory of New Mexico:

8 GENTLEMEN: You and each of you are hereby notified that on and prior to the 30th day of April, 1905, I was employed by the Atchison, Topeka & Santa Fe Railway Company, as a brakeman on a freight train, out of Gallup, New Mexico; that on or about the 30th day of April, 1905, between midnight and daylight a. m. I was ordered *ny* my superiors to assist in running a light engine out of the yards of Gallup, N. Mex. We were ordered to run over track No. 5 and it became my duty, as switchman and as one of the employés in charge of said engine to open the switches in order to get the engine off of this track on the main line and for this purpose it became necessary and a part of my duty, as well as the usual and customary practice of the brakeman, to get out and ride on the cow-catcher in order to locate the switches and throw same quickly and avoid delay. That while I was standing on the cow-catcher and keeping a careful lookout ahead *of* the engine ran on to a soft place in the track struck some low joints, and by reason of the defects in the track and roadbed, the engine sank down, or the track and rails sank with the engine and the pilot came in contact with a frog or some other obstruction on the track, and before I could get into a place of safety, the cow-catcher broke, threw me down and my foot was caught by the pilot of the engine and so badly mashed that it became necessary to have it amputated near the instep; that by reason of the injuries to my foot I am now and will be the remainder of my life so maimed and crippled as to be unable to follow my profession of railroading or do any other manual labor. That the following persons, and their addresses, are all the witnesses to the happening of the facts of said accident, as near as I have been at this time able to learn, to-wit:

Chas. Daze,	Engineer,	Winslow,	Ariz.
R. N. Lancaster,	Fireman,	"	"
Chas. Cain,	Conductor,	"	"

Robt. Howard, Gallup, N. M. Wm. Brown, Gallup, N. M.
Wm. Biddow, Gallup, N. M. Pete Buckley, Gallup, N. M.
F. McSparren, Gallup, N. M. N. J. Hudson, Gallup, N. M.

The above statement is made by me under oath, and is as full and fair a statement of the nature and extent of my injury, the manner and way in which it occurred and the cause of same as nearly as I am able to give or make.

9 GEORGE A. SOWERS.

Sworn to and subscribed by affiant, George A. Sowers, before me at my office in the town of *Gallup* and Territory of New Mexico. This the 29th day of June, 1905.

[SEAL.] W. F. KUCHENBECKER,
Notary Public, McKinley County,
Territory of New Mexico.

Endorsed: No. 5710. Geo. A. Sowers *vs.* Atchison, Topeka & Santa Fe Ry. Co., Plaintiff's First Amended petition. Filed this 2nd day of Dec. A. D. 1905. I. Alderete, Clerk District Court, El Paso Co., Tex. E. B. McClintock, Deputy.

Defendant's First Amended Answer.

Filed this 11th Day of Dec.

With leave of the Court Defendant files this his first amended original answer.

Forty-first Judicial District Court of El Paso County, Texas, September Term, A. D. 1905.

5710.

GEO. A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO.

To the Honorable District Court:

Now comes the defendant, the Atchison, Topeka & Santa Fe Railway Company, and shows to this Honorable Court that according to the allegations in plaintiff's petition contained the cause of action, if any plaintiff ever had, accrued without the State of Texas, and in the Territory of New Mexico, and that if any cause of action ever existed in favor of the said plaintiff and against this defend-
10 ant, it existed under, and was controlled by the provisions of that certain statute of the Territory of New Mexico, known as Chapter Thirty-three (33) of the Acts of the Thirty-fifth Legislative Assembly of the Territory of New Mexico, passed on March 11th, 1903, entitled "An Act Establishing the Law and Procedure in certain Cases," under and by virtue of which it is expressly by the

said act provided that thereafter no civil liability under either the common Law of any Statute of the Territory of New Mexico on the part of any person or corporation for any personal injuries inflicted, or death caused by such person or corporation within the said Territory of New Mexico, unless the said person claiming such damages within ninety (90) days after such injuries had been received, and within at least thirty (30) days before commencing the said suit to recover judgment for such damages, complied with certain provisions of the said law as to making affidavit as to the injuries received by the said plaintiff as to the manner in which such injuries were caused, and as to the names and address of all witnesses, as to the happenings of the facts or any part thereof causing such injuries, and as to the service of such notice on the defendant company, it being provided by the terms of the said law that all things therein prescribed, and the conditions precedent therein named were part of the law under which the right to recover for the injuries existed.

This defendant further says that by the terms of the said act the venue and the manner and form of maintaining the said suit are further expressly provided, and that each and all of the provisions of the said act and a compliance therewith are made conditions precedent to the maintenance of this suit, and that it appears from the petition of the plaintiff filed herein that none of the said provisions aforesaid have been complied with, and there is no allegation that the said conditions have been complied with, and therefore this defendant should not be required to answer further herein, and that suit should be dismissed, and as to this the defendant prays the judgment of the Court.

TURNEY & BURGES,
Attorneys for Defendant.

Further answering herein, if further answer be held necessary, this defendant says that the plaintiff should not be permitted to longer maintain this suit for the reason that according to plaintiff's petition his cause of action, if any he had, accrued in the
11 Territory of New Mexico, that all causes of action similar to the one sought to be set up by plaintiff are regulated and governed by the provisions of Chapter Thirty-Three of the Acts of the Thirty-fifth Legislative Assembly of New Mexico, entitled "An Act Establishing the Law and Procedure in Certain Cases," passed March 11th, 1903; that it is not alleged in said petition that the provisions of the said act have been complied with, and under and by the terms of the said provisions the plaintiff can maintain an action for the injuries received by him in the Territory of New Mexico, and nowhere else; and that therefore this suit should not be further maintained, and of this it prays the judgment of the Court.

TURNEY & BURGES,
Attorneys for Defendant.

THE STATE OF TEXAS, *County of El Paso:*

I, William H. Burges, do solemnly swear that I am one of the attorneys of record for the defendant, the Atchison, Topeka & Santa

Fe Railway Company, that I have read paragraphs one and two (1 & 2) of this answer, and that the allegations therein stated are true.

WM. H. BURGES.

Subscribed and sworn to before me, this the 4th day of September, A. D., 1905.

[SEAL.] S. P. WEISINGER,
Notary Public in and for El Paso County, Texas.

For further answer herein, this defendant says that it denies all and singular the allegations in plaintiff's petition contained, and of this it puts itself upon the country.

TURNEY & BURGES,
Attorneys for Defendant.

Endorsed: No. 5710. In 41st District Court of El Paso County, Texas. Geo. A. Sowers, *vs.* A. T. & S. F. Ry. Co., Defendant's Original Answer, filed this 5th day of Sep. 1905. I. Alderete, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

12 And for further answer comes now said defendant and says, that the plaintiff should not recover anything in this case, for the reason that if he sustained any injury at the time complained of, that then such injury, if any, was occasioned by plaintiff's own contributory negligence, in this, that the plaintiff at the time of his alleged injury, which was night time, had chosen as his place to ride the pilot, or cowcatcher, of his engine, which said pilot was not a safe place for plaintiff to stand and ride, and was known by plaintiff not to be a safe place, but, on the other hand, a very dangerous place to stand and ride. That the said pilot of said engine was not provided with any step or other place to stand upon; that same was constructed of slats, with openings between, but not intended for employees, including the plaintiff, to ride upon; that regardless of the condition of the track, switches and joints in the yard where plaintiff says he was injured, his attempt to ride on said pilot was a most dangerous undertaking, even when the track was in perfect order, which facts and all of which facts plaintiff well knew, and well knew that his standing and riding on said pilot would in all probability be attended with great hazard and danger, and he might be thrown therefrom or struck while thereupon and be injured in the manner in which he was injured, or in some other manner. That plaintiff was never ordered to so ride on said pilot, and never ordered to do the things which he did do, but he, with his own volution, sought this place of danger and undertook at his own risk to perform his labor, if any labor he did perform, from this dangerous position and that if any injury be received thereby and while so occupying said place of danger, the said injury was occasioned and brought about by his own contributory negligence and his failure to exercise due care and caution in the selection of a place to ride and from which to perform as he was called upon to perform.

That there were upon said engine and about same, safe places for

the plaintiff to have ridden in the performance of his said duties, that he could have ridden in the cab of the engine or upon the passway between the cab and the tender, or could have stood upon the steps of the engine, adjacent to the pilot and passway to the same, or he could have stood upon the top of the pilot out of the way of any danger occasioned by any obstruction upon the track or which might be occasioned by the pilot striking any joint of the track; but all this the plaintiff failed to do, but sought a more dangerous position, which act on his part, and which only, occasioned and
13 brought about his injury; wherefore, the defendant says that the plaintiff was guilty of such contributory negligence and such want of care and such want of failure to look out and care for his own interest as will preclude his recovery in this case; wherefore, the defendant prays the judgment of the court and puts itself upon the country.

That in so acting as above pleaded and in standing and riding upon said pilot, the plaintiff has violated the rules of this company, the defendant, which require him not to occupy a place of danger but a place of safety in performing any service which he had performed.

Defendant further says that if plaintiff had received any injury such as complained of, that then, the said injury so received and the causes for such injury and accident to him were such as is ordinarily incident to the business of railroading and incident to the business and duties of a switchman doing and performing the things and acts which the plaintiff states he was performing; and that the said dangers so incident to said business and the injuries which may have resulted to the plaintiff and as pleaded by him were such dangers and injuries as are and were incident to the business of switching and which all switchmen doing similar work assume and must assume in the performance and fulfillment of their duties as such; wherefore, the defendant says it is not liable for any injury to plaintiff, but that his injuries, if any, were occasioned by such conditions and under such circumstances as were incident to his business and which were assumed by him. Wherefore, the defendant prays judgment.

That if the plaintiff was injured in the manner and at the time and place alleged by him in his petition and the amendments thereto, that then, this defendant is not liable for such injuries, but that the same were occasioned by the negligence of the plaintiff and those that were fellow servants with him and accepts for his negligence, all his fellow servants, that he would not have been injured in any wise. That under the law of the Territory of New Mexico, and under the common law, which was at said time and is now in full force in said Territory of New Mexico where said accident occurred, the defendant would not be liable to plaintiff for any injury to him occasioned either by his own negligence as above pleaded or that of a fellow servant. That if the said fellow servants of plaintiff and those in charge of the operation of the engine upon which he was riding,

had properly managed and operated same, and those in
14 charge of the maintenance of the said Track No. 5 and of keeping same in good order had done and performed the duties required of them and which they were by reason of their employment required to do, that then, no accident would have happened to plaintiff and he would have received no injury, but this, defendant does not admit but expressly denies that there was any low joint to its Track No. 5 such as would occasion any injury to plaintiff, but, that if said low joint did exist at said time, that then, the existence of such low joint was due to the failure of the track gang employed at said place to do and perform their duties in relation thereto, and such failure would be negligence of plaintiff's fellow servants, for which negligence this defendant cannot be held liable; Wherefore, this defendant prays the judgment of the Court.

——— ———.

——— ———.

And if it be true that there was any low joint in Track No. 5, as alleged by plaintiff, which contributed to plaintiff's injury, (but the existence of which is denied), that then such low joint was caused by no negligence or want of care of the defendant but wholly because of the unprecedented, continuous and heavy, as well as unusual rainfall, occurring on the night of such injury and continuously for days theretofore, and that so unusual was such rainfall and so damaging its effect that it was impossible for defendant to either anticipate the same or to repair the damages occasioned thereby, although defendant employed every available man to be had in that vicinity and used every effort to keep its roadbed and its side tracks and switches in good repair.

Wherefore, defendant says that the condition of its roadbed and tracks, if any low joint existed, were brought about by the act of God and by the said unusual and unprecedented condition of the weather and continuous rainfall as aforesaid, which could not be anticipated nor foreseen;

Wherefore, it prays judgment and puts itself upon the country.

That the rules of defendant required the plaintiff to ask for and become familiar with all orders governing the operation and move-
ment of his train and that these were orders issued and re-
15 ceived by plaintiff's conductor warning said train crew of the soft condition of defendant's track and other orders which if observed by plaintiff would have put him upon notice of the condition of the track and roadbed. Whereupon defendant prays judgment.

TURNEY & BURGES,
Attorneys for Defendant.

Endorsed: No. 5710. Geo. A. Sowers *vs.* Atchison, Topeka & Santa Fe Ry. Co. Defendant's first amended answer. Filed this 11th day of Dec. A. D. 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Plaintiff's Exceptions and Answer.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 5710.

GEORGE A. SOWERS, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO., Defendant.

To the Hon. Judge of said Court:

Now comes plaintiff in the above styled and numbered cause and excepts to that portion and part of defendant's plea and answer setting up the Act of the Territory of New Mexico of date March 11th, 1903, and for exception says:

First. That said law is not applicable in this case and said plea should be stricken out for the reason that it comes too late, plaintiff having already filed an answer in said cause.

Second. Plaintiff says that said plea and law pleaded therein is not applicable in this case for the reason that plaintiff is not now, and never was a citizen of the Territory of New Mexico; that the defendant while operating its trains through the Territory of New Mexico does not have and maintain its principal office or its general office in the Territory of New Mexico, as provided by said Statute.

Third. That said plea should be stricken out for the reason that said law pleaded by defendant therein is null and void and
16 of no force and effect, and is not binding on this Court of plaintiff, and is and was unauthorized and in violation of the Act of Congress of the United States of America creating and establishing the Territory of New Mexico.

a. Because said Act was not submitted to the Congress of the United States for its approval as required by the organic law of the Territory of New Mexico.

b. Because said Act is a local and special law which attempts to regulate the practice in the courts of justice in the different States of the Federal Union.

c. Because said Act is a special law and is contrary to the organic law of said Territory of New Mexico, which says in all cases where a general law can be made applicable no special law shall be enacted in any of the Territories of the United States by the Territorial Legislature thereof.

d. Because said Act is in violation of Section 17th of the Organic Act of the Territory of New Mexico, which provides that the Constitution and all laws of the United States, which are not legally inapplicable shall have the same force and effect within the Territory of New Mexico as elsewhere in the United States.

e. Because same is in conflict with Article 2871 of the Statute of the Territory of New Mexico, which is as follows:

"In all the courts in this Territory, the common law, as recognized

in the United States of America, shall be the rule of practice and decision."

Fourth. Because said Act and all portions thereof is in violation of the Fifth Amendment of the Constitution of the United States in that it attempts to deprive plaintiff, and all persons affected by said law, of liberty and property without due process of law.

Fifth. That said Act and all parts thereof are void, in that it is class legislat*ure* and attempts to change and abridge the settled princip*al* of the law of the land, and takes away from Plaintiff, and all persons affected thereby, the right of transitory action guaranteed by the Constitution of the United States, and the law of the land.

Sixth. Said Act and all parts thereof is null and void as being in violation of the Fourteenth Amendment of the Constitution of the United States in that it attempts to oust and deprive courts
17 of competent jurisdiction of the right of the trial of transitory actions, and thereby denies all persons affected by said law of the equal protection of the law, and takes away from plaintiff his right of transitory action guaranteed to him by the law of the land.

Wherefore, plaintiff prays that all portions and parts of said plea which attempts to deprive this Court of the jurisdiction and venire of this suit, be stricken out and held for naught.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

And for further answer to defendant's answer, comes now plaintiff and denies all and singular each and every allegation therein contained, and of this he prays judgment of the court.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

And for other and further special answer herein, comes now plaintiff and says that at the time of said accident he was acting in the line of his duties and within the scope of his employment as brakeman on said train; that in order for him to properly do his work it became necessary and part of his duty to take his position on the pilot of said engine; that said engine was provided with a step, or foot-rest, on which plaintiff was standing at the time of said accident; that said foot-rest was maintained thereon for the purpose of plaintiff, and other of defendant's employees, to ride thereon; that at said time and long prior thereto, it had been and was, the usual and customary practice of all of defendant's employees, when it became necessary to do work in the yards or throw switches, to ride on the pilots of said engines, which fact and custom was known to the defendant, or could have been known to it by the exercise of ordinary care; that when the track was in reasonably safe condition it is not a dangerous undertaking to ride standing on the step of the pilot, and plaintiff says by reason of the aforesaid facts he was not guilty of any contributory negligence.

Plaintiff further avers and charges that defendant at the time of said accident did not have any rule, which prohibited him from riding on said pilot, or which notified or warned him that when he

took his position on said pilot he was violating any rule or regulations of the defendant company, but was acting in the line of his duties and in the scope of his employment as brakeman on
18 said engine; plaintiff denies that his accident was caused by any act of a fellow servant, and he denies that the employees of defendant, whose duty it was to repair said track, were fellow-servants, but says that the negligent failure of such employees to repair said track and keep same in safe condition was the negligence of this defendant, for which it is liable.

Wherefore, plaintiff prays that he have judgment of this Court.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

Endorsed: No. 5710. Geo. A. Sowers, *vs.* Atchison, Topeka & Santa Fe Ry. Co. Plaintiff's exceptions and answer to defendant's answer. Filed this 11th day of Dec. A. D. 1905. I. Alderete, Clerk District Court, El Paso Co. Texas. L. M. Dunlap, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Be it remembered: That on this the 11th day of December, 1905, came on to be heard the exceptions of plaintiff to the first amended answer of the defendant, that is to say, the first, second, third, fourth, fifth and sixth special exceptions to the first amended original answer of the defendant, and the Court having considered the said exceptions and all of them is of the opinion that each and all of them should be and they are hereby sustained, in so far as said law required plaintiff to institute or maintain his suit in the Courts of the Territory of New Mexico.

It is therefore the order and judgment of the Court that each and all of plaintiff's exceptions, Nos. one, two, three, four, five and six and all parts thereof in plaintiff's exceptions and answer to defendant's first amended answer be and they are hereby sustained, in so far as said law required plaintiff to institute or maintain his suit in the Courts of the Territory of New Mexico, to which action of
19 the Court defendant then and there excepted.

Charge of the Court.

Filed this 14th Day of Dec., A. D. 1905.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1905.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

GENTLEMEN OF THE JURY:

This is a suit brought by plaintiff, George A. Sowers, against the defendant, the Atchison, Topeka & Santa Fe Railway Company for damages for personal injuries alleged to have been sustained by him.

Now, as to the rules of law applicable to this cause, the Court instructs you as follows:

First.

You are the exclusive judges of the facts proved the credibility of the witnesses and the weight to be given to the testimony of each, but you are not the judges of the law. The law of the case you will take from this charge, and the special charges, if any, given you herewith, and it is your duty to be governed thereby.

Second.

The burden of proof in this case rests upon the plaintiff and before he can recover he must establish all the facts necessary to his recovery by a preponderance of the evidence.

Third.

By "proximate cause," as that term is used in this charge, is meant the direct cause without which the injury to plaintiff would not have occurred.

Fourth.

20 You are instructed that railway companies are not to be regarded as insurers of the safety of their employees and that when one enters the employment of a railway company he assumes all the risks and dangers that are ordinarily incident to the business, but he may presume that the company will furnish him with a reasonably safe place and track upon which to do his work in the operating of its engines, and he does not assume the risk arising from the failure of the company to do its duty unless he knows of such failure and attendant risks, or in the ordinary discharge of his duties must necessarily have acquired the knowledge.

Fifth.

It is the duty of a railway company to use ordinary care to prevent and avoid injury to its employees while engaged in the discharge of their duty, and to this end it is the duty of a railway company to use ordinary care to see that its road bed and tracks or sidings are in a reasonably safe condition to operate engines over and across, and by ordinary care is meant such prudence and care as a person of ordinary prudence would commonly exercise under like circumstances, and a failure to exercise such ordinary care as above defined to you is negligence.

Sixth.

It is the duty of every person to use such care and caution as a person of ordinary care and caution would commonly exercise under like circumstances to avoid injury to himself, and the degree of care required is always proportionate to the degree of danger indicated by the facts and circumstances of the case, or that which might have been reasonably foreseen by a person of ordinary prudence, and a failure to exercise such care is negligence; and by "contributory negligence" is meant some negligent act or omission on the part of the plaintiff, which concurring or co-operating with some negligent act or omission on the part of the defendant, is the proximate cause of the injury complained of.

Seventh.

If therefore you believe and find from the evidence and a preponderance thereof, that the defendant, the Atchison, Topeka and Santa Fe Railway Company permitted the road bed, track or side-track over which the engine upon which plaintiff, George A.
21 Sowers, was riding, to become soft and out of repair, so that as a consequence (if you so find) the point of the rail dropped so low that the engine is passing over it sagged or dropped down so low that the pilot thereof came in contact with or struck a frog; that such acts, if any, constituted negligence upon the part of the defendant railway company. That the pilot striking the said frog as aforesaid, if you have found from the evidence that it did so strike, caught plaintiff's foot, as charged in the plaintiff's petition, that the plaintiff thereby suffered the injuries alleged by him; that such acts of the defendant, if any, was the proximate cause of such injury, if any, suffered by plaintiff; and you further believe that the plaintiff was not guilty of contributory negligence, and that he did not assume the risks, then you will find for the plaintiff, but unless you do so believe you will find for the defendant.

Eighth.

If you believe from the evidence that plaintiff in taking the position on the pilot and standing thereon at the time of said accident as testified to by him, under all the surrounding facts and circumstances was negligence on his part, then and in that event your verdict will be for the defendant.

Ninth.

You are further instructed that unless you believe from a preponderance of the evidence that the defendant was guilty of negligence as charged in the petition, the plaintiff cannot recover in this cause, and in determining whether or not the defendant was guilty of negligence as charged, and in determining whether or not the plaintiff was guilty of contributory negligence, you must look to all the surrounding facts and circumstances in the evidence before you bearing upon these questions.

Tenth.

If you find for the plaintiff and allow him damages, you should allow him such sum as will reasonably compensate him for the injuries sustained, if any, and in estimating his damages you should take into consideration the mental and physical pain suffered by him in consequence of his injuries, and if you believe from the evidence that he will suffer mental and physical pain in the future in consequence of his injuries, you will take that into consideration in estimating his damages and if you believe from the evidence that
22 in consequence of plaintiff's injury his capacity to labor and earn money has been lessened you will take that into consideration in estimating his damages and allow him such sum of money, if paid now as you believe from the evidence will be a fair compensation for his diminished capacity, if any, to labor and earn money in the future.

JAMES R. HARPER,
Judge 41st Judicial District of Texas.

Endorsed: No. 5710. George A. Sowers *vs.* Atchison, Topeka & Santa Fe Ry. Co. Charge of the Court. Filed this 14th day of Dec. A. D. 1905. I. Aldrete, Clerk District Court, El Paso Co. Texas. E. McClintock, Deputy.

Special Charge No. 1.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1905.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

The defendant requests the court to charge the jury as follows:

GENTLEMEN OF THE JURY:

You are instructed that the undisputed evidence in this cause shows the injuries of the plaintiff were the natural and probable result of the risk assumed by him in accepting employment and

undertaking the discharge of the duties assumed by him and therefore he cannot recover herein, and you will return a verdict in favor of the defendant.

TURNEY & BURGES,
Attorneys for Defendant.

Refused—
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. George A. Sowers *vs.* Atchison, Topeka & Santa Fe Ry. Co. Special instruction No. one asked by the defendant. Filed this 14th day of Dec. A. D. 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

23

Special Charge No. 2.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D., 1905.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

GENTLEMEN OF THE JURY:—

At the request of the defendant you are instructed that the undisputed evidence in this cause shows the plaintiff was guilty of such contributory negligence as to prevent his recovering and you will return a verdict for the defendant.

TURNEY & BURGES,
Attorneys for the Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. George A. Sowers, *vs.* Atchison, Topeka & Santa Fe Ry. Co. Special instruction No. two asked by the defendant. Filed this 14th day of Dec. A. D., 1905. I. Alderete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Special Charge No. 3.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D., 1905.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

24 GENTLEMEN OF THE JURY:—

At the request of the defendant you are instructed that there is no evidence in this cause to show that any officer of the defendant company, or any one having authority over plaintiff to prevent same, knew of his practice, if any such practice existed, or the practice of any one else, if any such practice existed, of riding on the pilot of its engines under the circumstances under which the plaintiff was injured in this case, and therefore you will not consider the evidence introduced on the subject of such practice of the employees of the defendant, and such practice or custom would not relieve plaintiff from the consequence of his negligence in riding in a place of danger, if you believe from the evidence herein that it is negligence to ride at such place, as negligence has been heretofore defined to you.

TURNEY & BURGES,
Attorneys for the Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. George A. Sowers, *vs.* Atchison, Topeka & Santa Fe Railway Co. Special Instruction No. three asked by the defendant. Filed this 14th day of Dec. A. D., 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Special Charge No. 4.

In the District Court of El Paso County, Texas, — Judicial District, November Term, A. D., 1905.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

GENTLEMEN OF THE JURY:—

At the request of the defendant you are hereby instructed that if you believe from the evidence that a position on the pilot of the

engine was one of danger and that this was open to the
25 knowledge and observation of plaintiff, then you will return a verdict in favor of the defendant whether you find the agents or employees of the defendant permitted plaintiff to ride on the pilot or not.

TURNEY & BURGES,
Attorneys for the Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. George A. Sowers, *vs.* Atchison, Topeka & Santa Fe Ry. Co. Special Instruction No. four asked by the defendant. Filed this 14th day of Dec. A. D., 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Special Charge No. 5.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D., 1905.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

GENTLEMEN OF THE JURY:—

At the request of the defendant you are hereby instructed that no custom or usage, should you believe from the evidence one has been shown, can never be relied on to excuse an act in itself negligent and if you believe from the testimony that the act of riding on the pilot of a locomotive proximately contributed to plaintiff's injury you will find for the defendant as such act of riding on the pilot of an engine is negligence as a matter of law.

TURNEY & BURGES,
Attorneys for the Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

26 Endorsed: No. 5710. George A. Sowers *vs.* Atchison, Topeka & Santa Fe Ry. Co. Special Instruction No. five asked by the Defendant. Filed this 14th day of Dec. A. D. ——. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Special Charge No. 6.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1905.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

GENTLEMEN OF THE JURY:

At the request of the defendant you are hereby instructed that if you believe from the evidence before you that a position on the pilot of an engine was one of danger, and particularly in the event of a collision with any obstruction of any kind on the track, and that plaintiff's presence on the pilot contributed proximately to the injuries he sustained, then he cannot recover herein and your verdict must be for the defendant.

TURNEY & BURGES,
Attorneys for the Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. George A. Sowers *vs.* Atchison, Topeka & Santa Fe Ry. Co. Special Instructions No. six asked by the defendant. Filed this 14th day of Dec. A. D., 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

27 *Special Charge.*

No. 5710.

GEO. A. SOWERS
vs.
A., T. & S. F. RY. CO.

GENTLEMEN OF THE JURY:

At the request of the defendant I charge you that as the accident to the plaintiff occurred in the Territory of New Mexico that therefore the common law as understood is the law governing this action as to fellow servants and that under such common law the defendant would not be liable if the injur*ing* to plaintiff was caused by the negligence of a fellow servant.

A fellow servant of plaintiff is a servant of the defendant who at the time of the injury was a co-laborer with plaintiff on the engine or those persons whose duty it was to keep the track No. 5 in repair.

Therefore if you believe that any such fellow servant of the plaintiff was guilty of negligence, if any, and that such negligence contributed to cause, or did cause the injury to plaintiff that then the defendant would not be liable therefore and if you further find that such injury would not have occurred except for such negligence of such fellow servants, that then your verdict should be for defendant.

TURNEY & BURGES,
Attorneys for Def't.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. Geo. A. Sower- *vs.* A. T. & S. F. Ry. Co. Filed this 14 day of Dec. A. D., 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Special Charge No. 7.

28 No. 5710.

GEO. A. SOWERS
vs.
A., T. & S. F. RY. CO.

GENTLEMEN OF THE JURY:

At the request of the defendant you are charged: that under the law of the Territory of New Mexico pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit and as there is no testimony showing such fact, your verdict should be for the defendant.

TURNEY & BURGES,
Attorneys for Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. No. 41st Dict. Ct. El Paso Co. Tex. Geo. A. Sowers, *vs.* A. T, & S. F. Ry. Co. Special Charge No. 7 asked by def't. Filed this 14th day of Dec. A. D., 1905. I. Aldrete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Special Charge No. 8.

No. 5710.

GEO. A. SOWERS
vs.
A., T. & S. F. RY. Co.

GENTLEMEN OF THE JURY:

At the request of the defendant you are charged: That if you believe the defendant at the time of his injury was standing with his right foot dangling in front of the lower slat of the engine pilot and not upon said slat and that had plaintiff not so let his foot dangle in front of said slat he would not have been injured and that to so let his foot dangle was negligence, then your verdict should be for the defendant.

29

TURNEY & BURGES,
Attorneys for Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. No. 41st Dist. Ct. El Paso Co., Texas. Geo. A. Sowers, *vs.* A. T. & S. F. Ry. Co. Special Charge No. 8, asked by defendant. Filed this 14th day of Dec. A. D., 1905. I. Alderete, Clerk District Court, El Paso Co, Texas. L. M. Dunlap, Deputy.

Special Charge No. 9.

No. 5710.

GEO. A. SOWERS
vs.
A., T. & S. F. RY. Co.

GENTLEMEN OF THE JURY:

At the request of defendant you are charged: That as to the duty of the defendant toward the plaintiff you are charged that it was the duty of defendant to use reasonable care to provide a reasonably safe place for plaintiff to perform his work and nothing more.

Therefore if you believe that the defendant did use reasonable care to furnish a reasonably safe engine and a reasonably safe track then your verdict should be for defendant.

TURNEY & BURGES,
Attorneys for Defendant.

Refused.
JAMES R. HARPER,
Judge Presiding.

Endorsed: No. 5710. No. 41st Dist. Ct. El Paso Co., Tex. Geo. A. Sowers *vs.* A. T. & S. F. Ry. Co. Special Charge No. 9, asked by defendant. Filed this 14th day of Dec. A. D., 1905. I. Alderete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

30 *Judgment and Verdict.*

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO.

Be it remembered that on the 11th day of Dec. 1905, came to be heard the above styled cause and all parties appeared and announced ready for trial, thereupon came a jury consisting of H. Mebus and eleven others duly empaneled, qualified and sworn, who after hearing all the evidence, argument of counsel and the laws given them in the charge of the Court, retired to consider their verdict and subsequently returned on the 15th day, December 1905, returned into open Court the following verdict, to-wit:

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO.

We, the jury, in the above entitled cause find for plaintiff and assess the damage at five thousand dollars.

E. MABUS, *Foreman.*

It is therefore the order, judgment and decree of the court that plaintiff, Geo. A. Sowers, do have and recover of and from the defendant, the Atchison, Topeka & Santa Fe Railway Company, the sum of Five Thousand (5000.00) Dollars with interest thereon from this date at the rate of 6% per annum, together with all costs in this behalf expended for all of which let execution issue.

JAMES R. HARPER,
Judge 34 Dist. of Texas.

Amended Motion.

In the District Court of the 41st Judicial District, El Paso County, Texas.

No. 5710.

31 GEORGE A. SOWERS
vs.
A., T. & S. F. RY. CO.

Now comes the defendant and with leave of the court, amends its motion for a new trial filed herein on the 16th day of December, 1905, and for such amendment, says:

First.

The Court erred in admitting over the objection of the defendant, the testimony of each of plaintiff's witnesses, to the effect that the witnesses heard of other employees riding on the pilots of defendant's engines; that said witnesses had seen other employees riding on pilots of defendant's engines; that said witnesses had themselves ridden on pilots of the defendant's engines; that it was the custom of employees to ride on the pilots of defendant's engines, all of which testimony is shown by defendant's Bill of Exceptions No. 1. Said testimony was shown *by* inadmissible because no habit or custom on the part of employees to ride upon a place of danger would bind the defendant, and further, because it was not shown that the defendant ever knew, or that any officer of the defendant ever knew of such custom, or that he or the Company sanctioned the same, and further because of the objections and exceptions reserved at the time and shown in the record.

Second.

The Court erred in admitting over the objection of the defendant, the depositions read in evidence, to-wit, the 8th, 9th, 10th, 11th and 12th answers in the depositions of witnesses Beddow, Howard and Daze, to the effect that it was the custom of employees to ride on the pilots of engines; that upon other roads the employees ride upon the pilots of engines; that other employees besides the witnesses rode upon the pilots of engines. The admission of this testimony was error, because no such acts of the employees could bind the company, and especially could not the acts of employees of other roads bind this company, because said testimony and all of same and all that set forth and referred to in paragraph 1, was irrelative and immaterial and introduced to prejudice the rights of the defendant and show a license in the plaintiff to occupy a place of danger on the particular engine in question and to establish a custom when
32 no knowledge of such custom and no knowledge of the acts of those so acting has been shown to have ever been brought

to the knowledge of the Company or any of the managing officials thereof, all of which is fully shown by Bill of Exceptions No. 2 and in the record of this case."

Third.

The Court erred in refusing to give defendant's Special Charge No. 1, as follows: "You are instructed that the undisputed evidence in this cause shows the injuries of the plaintiff were the natural and probable result of the risk assumed by him in accepting employment and undertaking the discharge of the duties assumed by him and therefore he cannot recover herein, and you will return a verdict in favor of the defendant.

Because same was the law in this case, and not incorporated in the Court's main charge.

Fourth.

The Court erred in refusing to give defendant's Special Charge No. 2, as follows: "At the request of the defendant you are instructed that the undisputed evidence in this cause shows the plaintiff was guilty of such contributory negligence as to prevent his recovering and you will return a verdict for the defendant."

Because same was the law in this case and not incorporated in the Court's main charge.

Fifth.

The Court erred in refusing to give defendant's Special Charge No. 3, as follows: "At the request of the defendant you are instructed that there is no evidence in this cause to show that any officer of the defendant company, or anyone have- authority over plaintiff to prevent same, knew of his practice, if any such practice existed, or the practice of anyone else, if any such practice existed, of riding on the pilot of its engines under the circumstances under which the plaintiff was injured in this case, and therefore you will not consider the evidence introduced on the subject of such practice of the employees of the defendant, and such practice or custom would not relieve plaintiff from the consequences of his negligence in riding in a place of danger, if you believe from the evidence herein that it is negligence to ride at such place as negligence has been heretofore defined to you.

Because same was the law in this case and not incorporated
33 in the Court's main charge.

Sixth.

The Court erred in refusing to give defendant's Special Charge No. 4, as follows: "At the request of the defendant you are hereby instructed that — you believe from the evidence that a position on the pilot of the engine was one of danger and that this was open to the knowledge and observation of plaintiff, then you will return a verdict in favor of the defendant whether you find the agents or em-

ployees of the defendant permitted plaintiff to ride on the pilot or not."

Because same was the law in this case and not incorporated in the Court's main charge.

Seventh.

The Court erred in refusing to give Defendant's Special charge No. 5, as follows: "At the request of the defendant you are hereby instructed that no custom or usage, should you believe from the evidence one has been shown, can ever be relied on to excuse an act in itself negligent and if you believe from the testimony that the act of riding on the pilot of a locomotive proximately contributed to plaintiff's injury you will find for the defendant, as such act of riding on the pilot of an engine is negligence as a matter of law.

Because same was the law in this case and was not incorporated in the Court's main charge.

Eighth.

The Court erred in refusing to give defendant's Special Charge No. 6 as follows: "At the request of the defendant you are hereby instructed that if you believe from the evidence before you, that a position on the pilot of an engine was one of danger and particularly in the event of a collision with any obstruction of any kind on the track and that plaintiff's presence on the pilot contributed proximately to the injuries he sustained, then he cannot recover herein and your verdict must be for the defendant."

Because the same was the law in this case and was not incorporated in the Court's main charge.

Ninth.

The Court erred in refusing to give defendant's Special Charge No. 7, as follows: "At the request of the defendant I charge you that as the accident to the plaintiff occurred in the Territory of New Mexico, that therefore the common law as understood is the law
34 governing this action as to fellow servants and that under such common law the defendant would not be liable if the injury to plaintiff was caused by the negligence of a fellow servant. A fellow servant of plaintiff is a servant of the defendant who at the time of the injury was a co-laborer with plaintiff on the engine or those persons whose duty it was to keep the track No. 5 in repair. Therefore, if you believe that any such fellow servant of the plaintiff was guilty of negligence, if any, and that such negligence contributed to cause or did cause the injury to plaintiff, that then the defendant would not be liable therefor, and if you further find that such injury would not have occurred except for such negligence of such fellow servants, that then your verdict should be for defendant."

Because same was the law in this case and was not incorporated in the Court's main charge.

Tenth.

The Court erred in refusing to give defendant's Special Charge No. 8, as follows: "That under the law of the Territory of New Mexico pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

Because same was the law in this case and was not incorporated in the Court's main charge.

Eleventh.

The Court erred in refusing to give defendant's Special Charge No. 9, as follows: "At the request of the defendant, you are charged: That if you believe the defendant at the time of his injury was standing with his right foot dangling in front of the lower slat of the engine pilot and not upon said slat and that had plaintiff not so let his foot dangle in front of said slat he would not have been injured and that to so let his foot dangle was negligence, than your verdict should be for the defendant."

Because same was the law in this case and was not incorporated in the Court's main charge.

Twelfth.

The Court erred in the Fifth paragraph of its charge, wherein the jury are told as follows: "It is the duty of a railway company to use ordinary care to prevent and avoid injury to its employees
35 while engaged in the discharge of their duty, and to this end it is the duty of a railroad company to use ordinary care to see that its roadbed and tracks or sidings are in a reasonably safe condition to operate engines over and across, and by ordinary care is meant such prudence and care as a person of ordinary prudence would commonly exercise under like circumstances, and a failure to exercise such ordinary care as above defined to you, is negligence."

Because same calls for higher degree of care than is required by law.

Thirteenth.

The Court erred in the Seventh Paragraph of its main charge, in which the jury are instructed as follows: "If therefore you believe and find from the evidence and a preponderance thereof, that the defendant, the Atchison, Topeka & Santa Fe Railway Company, permitted the roadbed. track or side track over which the engine upon which plaintiff, George A. Sowers, was riding, to become soft and out of repair, so that as a consequence (if you so find) the point of the rail dropped so low that the engine in passing over it sagged or dropped down so low that the pilot thereof came in contact with or struck a frog, that such acts, if any, constituted negligence upon the part of the defendant railway company."

Because said charge of the court sums up a certain state of facts, conditions and happenings and tells the jury that same constitute negligence on the part of defendant railway company. Said charge is error because the same is a charge upon the weight of the evidence, and further, because same assumes the existence of facts which did not exist; and, because the said charge finds the facts which the jury, and jury alone, should find to exist, and for said reason the entire paragraph 7th is error and should not have been given.

Fourteenth.

The Court erred in sustaining the demurrers and exceptions of the plaintiff to defendant's plea set forth in its amended answer in which the laws of the Territory of New Mexico were pleaded as a defense to this action, when it was shown and admitted that no such suit had been brought by the plaintiff in the Territory of New Mexico as provided by the laws of said Territory introduced in evidence.

Fifteenth.

36 The verdict and judgment in this case is excessive and should not be allowed to stand. The plaintiff testified that his toes only were cut off, and further, that he could earn the sum of three dollars per day, or ninety dollars per month, and that he was actually earning said sum when he left New Mexico to come here to attend this trial. It was further shown by plaintiff that the highest wages he ever received was one hundred dollars per month.

Wherefore and because of the foregoing reasons, Defendant asks the Court to set aside the judgment in this cause and grant a new trial.

TURNEY & BURGES,
Attorneys for Defendant.

Endorsed: No. 5710. — A. Sowers, *vs.* A. T. & S. F. Ry. Co. Defendant's Amended Motion for a new trial and to set aside verdict and judgment. Filed this 29th day of Dec. A. D., 1905. I. Alderete, Clerk District Court, El Paso Co., Texas. E. B. McClintock, Deputy.

Order Overruled Motion for a New Trial.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO.

On this the 30th day of December, 1905, came on to be heard the defendant's amended motion for a New Trial, and both parties appeared by their respective attorneys and announced ready; thereupon said motion was read to the Court, and the Court being fully

advised thereon, is of the opinion that the law is with the plaintiff, and that said motion should be overruled.

It is therefore the order, judgment and decree of the Court that said motion is in all things overruled, to which action of the Court in overruling said motion, the defendant then and there in open court excepted and gave notice of appeal to our Court of Civil
37 Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, Bexar Co., Texas.

It is the further order of the Court, upon application of the defendant, that the parties be and are hereby granted twenty days from and after adjournment of the present term of this court in which to prepare, have approved and filed a Statement of Facts and Bills of Exception. This order is entered on the docket of the Court, as well as on the minutes.

Assignment of Errors.

In the District Court, 41st Judicial District, El Paso County, Texas.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Comes now the defendant and files this its assignment of errors, and upon which assignment of errors the defendant asks a reversal of this cause.

First.

Court erred in admitting, over the objection of the Defendant, the testimony of *Plaintiff, Daze, Stromberg, Cain, Lancaster and Campbell,* witnesses for plaintiff, to the effect that said witnesses and each of them had heard of other employees of the defendant riding on the pilot of defendant's engines; that said witnesses had seen other employees riding on the pilots of defendant's engines; that they themselves had ridden on the pilots of defendant's engines, and that it was the custom of employees to ride on the pilots of defendant's engines. All of which said testimony, so introduced over the objection of defendant, was inadmissible because no habit or custom on the part of the employees to ride in a place of danger would bind the defendant, and further, because it was not shown that defendant ever knew, or that any officer of the defendant ever knew of such custom, or that the defendant company sanctioned such custom, and because said evidence was wholly irrelevant and immaterial,
38 and hearsay all of which is shown by objections and exceptions set forth in the record of the stenographer in this cause.

Second.

The Court erred in admitting, over the objection of defendant, the depositions read in evidence, to-wit, the 8, 9, 10, 11 and 12 answers

in depositions of witnesses Beddow, Howard and Daze, in substance and to the effect that it was the custom of employees of the defendant to ride on the pilots of engines and that upon other roads the employees rode upon the pilots of the engines, and that other employees of the defendant besides the witnesses, rode upon the pilots of engines. The admission of this testimony was error because no such acts of the employees of this company could bind this defendant, and especially could not the acts of the employees of other roads bind this Company, and because said Testimony and all of same was irrelevant and immaterial hearsay and tended to prejudice the rights of the defendant and show a license in the plaintiff to occupy a place of danger on the particular engine in question, and to establish a custom when no knowledge of such custom and no knowledge of the acts of those so acting has been shown to have ever been brought to the knowledge of the company, or to the managing officers thereof. All of which testimony and objections and exceptions thereto are fully shown in the stenographer's statement of facts of record in this cause.

Third.

The Court erred in refusing to give defendant's special charge No. 1 as follows: "You are instructed that the undisputed evidence in this cause shows the injuries of the plaintiff were the natural and probable result of the risk assumed by him in accepting employment and undertaking the discharge of the duties assumed by him and therefore he cannot recover herein, and you will return a verdict in favor of the defendant."

Because the same was the law in the case and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and, therefore, said special charge should have been given.

Fourth.

The Court erred in refusing to give defendant's Special Charge No. 2 as follows: "At the request of the defendant you are
39 instructed that the undisputed evidence in this cause shows the plaintiff was guilty of such contributory negligence as to prevent his recovering and you will return a verdict for the defendant."

Because same was the law in this case, and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said Special Charge should have been given.

Fifth.

The Court erred in refusing to give defendant's Special Charge No. 3, as follows: "At the request of the defendant you are instructed that there is no evidence in this cause to show that any officer of the defendant company, or anyone having authority over plaintiff to prevent same, knew of his practice, if any such practice existed, or the practice of anyone else, if any such practice existed,

of riding on the pilot of its engines under the circumstances under which the plaintiff was injured in this case, and therefore you will not consider the evidence introduced on the subject of such practice of the employees of the defendant, and such practice or custom would not relieve plaintiff from the consequences of his negligence in riding in a place of danger, if you believe from the evidence herein that it is negligence to ride at such place as negligence has been heretofore defined to you."

Because the same was the law in the case and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Sixth.

The Court erred in refusing to give defendant's Special Charge No. 4, as follows: "At the request of the defendant you are hereby instructed that if you believe from the evidence that a position on the pilot of the engine was one of danger and that this was open to the knowledge of plaintiff, then you will return a verdict in favor of the defendant whether you find the agents or employees of the defendant permitted plaintiff to ride on the pilot or not."

Because the same was the law in the case and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Seventh.

40 The Court erred in refusing to give defendant's Special Charge No. 5, as follows: "At the request of the defendant you are hereby instructed that no custom or usage, should you believe from the evidence one has been shown, can ever be relied on to excuse an act in itself negligent, and if you believe from the testimony that the act of riding on the pilot of a locomotive proximately contributed to plaintiff's injury, you will find for the defendant, as such act of riding on the pilot of an engine is negligence as a matter of law."

Because the same was the law in the case and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Eighth.

The Court erred in refusing to give defendant's Special Charge No. 6, as follows: "At the request of the defendant you are hereby instructed that if you believe from the evidence before you, that a position on the pilot of an engine was one of danger and particularly in the event of a collision with any obstruction of any kind on the track and that plaintiff's presence on the pilot contributed proximately to injuries he sustained, then he cannot recover herein and your verdict must be for the defendant."

Because the same was the law in the case and was not incorporated

in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Ninth.

The Court erred in refusing to give defendant's Special Charge No. — as follows: "At the request of the defendant, I charge you that as the accident to the plaintiff occurred in the Territory of New Mexico, that therefore the common law as understood is the law governing this action as to fellow servants and that under such common law the defendant would not be liable if the injury to plaintiff was caused by the negligence of a fellow servant. A fellow servant of plaintiff is a servant of the defendant who at the time of the injury was a co-laborer with plaintiff on the engine or those persons whose duty it was to keep the track No. 5 in repair. Therefore, if you believe that any such fellow servant of the plaintiff was guilty of negligence, if any, and that such negligence contributed to cause
41 or did cause the injury to plaintiff, that then the defendant would not be liable therefor, and if you further find that such injury would not have occurred except for such negligence of such fellow servants, that then your verdict should be for defendant."

Because the same was the law in the case and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Tenth.

The Court erred in refusing to give defendant's Special Charge No. 7, as follows: "That under the law of the Territory of New Mexico pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

Because the same was the law in the case and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Eleventh.

The Court erred in refusing to give defendant's special Charge No. 8, as follows: "At the request of the defendant, you are charged: That if you believe the plaintiff at the time of his injury was standing with his right foot dangling in front of the lower slat of the engine pilot and not upon said slat and that had plaintiff not so let his foot dangle in front of said slat, he would not have been injured and that to so let his foot dangle was negligence, then your verdict should be for the defendant."

Because the same was the law in the case and was not incorporated in the Court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Twelfth.

The Court erred in the Fifth Paragraph of its charge, wherein the jury are told as follows: "It is the duty of a railway company to use ordinary care to prevent and avoid injury to its employees while engaged in the discharge of their duty, and to this end it is
42 the duty of a railway company to use ordinary care to see that its roadbed and tracks or sidings are in a reasonably safe condition to operate engines over and across, and by ordinary care is meant such prudence and care as a person of ordinary prudence would commonly exercise under like circumstances, and a failure to exercise such ordinary care as above defined to you, is negligence."

Because same calls for a higher degree of care than is required by law.

Thirteenth.

The Court erred in the Seventh Paragraph of its main charge, in which the jury are instructed as follows: "If therefore you believe and find from the evidence and a preponderance thereof, that the defendant, the Atchison, Topeka & Santa Fe Railway Company, permitted the roadbed, track or side track over which the engine upon which plaintiff, George A. Sowers, was riding, to become soft and out of repair, so that as a consequence (if you so find) the point of the rail dropped so low that the engine in passing over it sagged or dropped down so low that the pilot thereof came in contact with or struck a frog. That such acts, if any, constituted negligence upon the part of the defendant railway company."

Because said charge of the Court sums up a certain state of facts, conditions and happenings and tells the jury the same constitute negligence on the part of the defendant railway company. Said charge is error because the same is a charge upon the weight of the evidence, and further, because same assumes the existence of facts which did not exist, and because the said charge finds the facts which the jury, and the jury alone, should find to exist, and for said reasons the entire Seventh Paragraph is error and should not have been given.

Fourteenth.

The Court erred in sustaining the demurrer of the plaintiff to defendant's plea set forth in its amended answer in which the laws of the Territory of New Mexico were pleaded as a defense to this action when it was shown and admitted that no such suit had been brought by the plaintiff in the Territory of New Mexico as provided by the laws of said Territory, said laws being fully pleaded and introduced in evidence.

Fifteenth.

The Court erred in sustaining plaintiff's exception to the defendant's answer, which exception was filed in this cause on the
43 11th day of December, 1905, for the reason that the defendant company did not own any line of railway in the State of Texas; that it did own and operate a line of railway in the Territory

of New Mexico; that it did have agents in the said Territory of New Mexico upon whom service may be had; that it was shown that the courts held regular sessions in the said Territory of New Mexico, and in the county where said accident occurred, which said courts had jurisdiction of the matters and things involved in this controversy; that it had not been shown and was not pleaded that the plaintiff ever brought his suit in the Territory of New Mexico within the time fixed by the Act pleaded by defendant, or within any other time; because the Act of the Legislature pleaded by defendant was not a local or special law, but a general law; that the said Act so pleaded was not contrary to the organic law of said Territory, because said Act so pleaded by defendant was not contrary to the Seventeenth Provision of the organic law of the Territory of New Mexico; because said Act so pleaded was not in violation of the Fifth Amendment of the Constitution of the United States, or any other amendment; because said Act of the Legislature was not void, was not class legislation, but was and has been held to be such legislation as the legislature of the Territory of New Mexico might have enacted; because none of the reasons pleaded by the plaintiff in said exception or any subdivision of said exception, were valid, nor should said exception or any subdivision thereof have been sustained.

Wherefore the Court erred in sustaining the plaintiff's said exception to the defendant's answer setting forth the law of New Mexico as pleaded in said answer.

Sixteenth.

The verdict and judgment in this case is excessive and should not be allowed to stand. The plaintiff testified that his toes only were cut off, and further that he could earn the sum of three dollars per day, or ninety dollars per month, and that he was actually earning said sum when he left New Mexico to come here to attend this trial. It was further shown by plaintiff that the highest wages he ever received was one hundred dollars per month.

Wherefore and because of the foregoing reasons, defendant asks the Court to set aside the judgment in this cause and grant a new trial.

TURNEY & BURGES,
Attorneys for Defendant.

44 Endorsed: No. 5710. Geo. A. Sowers, *vs.* A. T. & S. F. Ry. Co. Assignment of error. Filed this 7th day of Mch. A. D. 1906. I. Alderete, Clerk District Court, El Paso Co., Texas. L. M. Dunlap, Deputy.

Supersedeas Bond on Appeal.

No. 5710.

GEORGE A. SOWERS
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

In the District Court for El Paso County, Texas, Forty-first Judicial District.

Whereas, on the 30th day of December, 1905, a judgment final in the above entitled and numbered cause was rendered by the District Court of El Paso County, in a suit therein pending in favor of George A. Sowers, against The Atchison, Topeka & Santa Fe Railway Company, a corporation, not a resident of El Paso Co. Texas, for five thousand (5000.00) dollars with legal interest from that date until paid, with all costs of suit and the said, The Atchison, Topeka & Santa Fe Railway Company has appealed from said judgment to our Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

Now, therefore, know all men by these present, that we, The Atchison, Topeka and Santa Fe Railway Company as principal and the other subscribers hereto as sureties, are held and firmly bound to pay to George A. Sowers the full and just sum of Twelve thousand (1200-) Dollars for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents; conditioned that the above bounden principal, appellant, shall prosecute its said appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeal shall be against it that it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

In Testimony of all which, we have hereunto subscribed our names, this 26 day of January, 1906.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
45 By WM. H. BURGES,
One of D's Attorneys of Record.
A. KOHLBERG.
J. J. MUNDY.

Approved
I. ALDERETE,
Clerk District Court, El Paso County, Texas,
By L. M. DUNLAP, *Deputy.*

Endorsed: No. 5710. In District Court, El Paso County, George A. Sowers, *vs.* A. T. & S. F. Ry. Co. Supersedeas Bond on Appeal. Approved and filed this 27th day of Jan. 1906. I. Alderete, Clerk District Court, El Paso County, By L. M. Dunlap, Deputy.

Bill of Costs in District Court.

THE STATE OF TEXAS:

GEORGE A. SOWERS, Plaintiff,
vs.
THE A., T. & S. F. RY. CO., Defendant.

M— —— —— to Officers of Court, Dr.

The Costs Accrued in the Above Entitled Cause to Adjournment of —— Term, 190–.

Clerk's Fees:

Citation and Copy P	$1.25
Docketing Cause P	.20
Docketing 1 Motion D	.15
Filing 19 papers, P. 4, D. 15	2.85
Entering appearance P. D. 1	.30
Entering 5 orders, P. 3, D. 2	3.75
Swearing 6 witnesses, P. 2, D. 4	.60
Approving 1 Bond, D	1.50
Swearing and Empaneling Jury P	.35
Recording Verdict D	.35
Issuing Commission to take Depositions 3, D	2.25
Entering Final Judgment, D	1.00
Taxing Costs and 1 copy thereof, D	.25
Transcript to App., Court 47	28.20
Total Clerk's Fees	$43.00

46 Sheriff's Fees:

Executing Writ	$1.50
Jury Fees	.50
Total Sheriff's Fees	$2.00
Jury Fee	5.00
Witness Attendance, Stenographer	3.00
Judge's Fees, Notaries	40.00
	$50.00
Total Clerk's Costs	43.00
Total Costs	$93.00

THE STATE OF TEXAS, *County of El Paso:*

I hereby certify the above to be a correct account of the Costs in above entitled and numbered suit, up to this date.

Witness my hand and Seal of said Court, affixed at office in El Paso, Texas, this 19th day of March, 1906.

Attest: I. ALDERETE,
Clerk District Court, El Paso County,
[SEAL.] By E. B. McCLINTOCK, *Deputy.*

Clerk's Certificate.

STATE OF TEXAS, *County of El Paso:*

I, I. Alderete, Clerk of the District Court, in and for the County of El Paso, State of Texas, do hereby certify that the foregoing 49 pages besides this, contain a full, true and correct Transcript and copy of the Record and of all papers filed and all proceedings had in Cause Number 5710, George A. Sowers vs. Atchison, Topeka and Santa Fe Railway Company, as the same appears now on file and of record in my office.

47 Given under my hand and the seal of said Court, at office in El Paso, this the 20" day of March, A. D., 1906.

I. ALDERETE,
Clerk District Court, El Paso County, Texas,
[SEAL.] By L. M. DUNLAP, *Deputy.*

Endorsement: 3596. A. T. & S. F. Ry. Co., Appellant, *vs.* Geo. A. Sowers, Appellee. From the District Court, El Paso County. Applied for by Turney & Burges on the 27th day of January, 1906, and delivered to Burges on the 20th day of March, 1906. I. Alderete, Clerk of the District Court, El Paso County, By L. M. Dunlap, Deputy. Filed in Court of Civil Appeals at San Antonio the 2nd day of April, 1906. H. E. Hildebrand, Clerk, J. Murray, Deputy.

Statement of Facts.

In the District Court of El Paso County, Texas, 31st Judicial District, November Term, A. D. 1906.

No. 5710.

GEORGE A. SOWERS
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

COUNSEL FOR DEFENDANT: We except to the ruling of the Court in sustain- the exception of plaintiff to defendant's plea in abatement.

GEORGE A. SOWERS, plaintiff, being duly sworn, testified as follows:—

Q. What is your name?
A. George A. Sowers.
Q. What is your age, Mr. Sowers?
A. Twenty-six—twenty-six years.

48 Q. You plaintiff in this case?
A. Yes, sir.
Q. What were you doing—by whom were you employed on or prior to the 30th day of April, this year?
A. Was brakeman for the Santa Fe Railroad.
Q. The Atchison, Topeka & Santa Fe Railway Company?
A. Yes sir.
Q. Where was your run?
A. Running on the Albuquerque division.
Q. Talk a little louder.
A. Albuquerque division.
Q. Where is Gallup with reference to that division?
A. Gallup is 158 miles West of Albuquerque.
Q. What kind of brakeman were you, front or rear?
A. Front brakeman.
Q. What were your wages, or what was the average wages of brakemen at that time?
A. Something over a hundred.
Q. What were your wages?
A. My wages averaged a little over a hundred.
Q. A month?
A. Yes sir.
Q. What experience have you had in railroad-?
A. I have had very nearly three years' experience.
Q. That your profession or calling?
A. Yes sir.
Q. What roads have you worked for?
A. The Northern Pacific, International of Mexico, and I worked for the Alamogordo Lumber Company.
Q. In what capacity for the Alamogordo Lumber Company?
A. Brakeman. Log train Brakeman.
Q. What were you doing on the 30th day of April this year—or the 29th?
A. We left Winslow on the evening of the 29th going to Winslow, and returned again to get another engine.
Q. What was the cause of your return?
A. We had an accident out West of Gallup, the engine left
49 the track there, and we had to go back and get another engine.
Q. Who went back for the engine?
A. Mr. Cain and myself.
Q. Who is Mr. Cain?
A. Conductor of the train.
Q. Your conductor?
A. Yes sir.
Q. Go ahead and tell the jury everything you did up to the time you were hurt?
A. We went back to Gallup to get a new engine, we left the train at the west yards,——
Q. How far is that from Gallup?
A. West yards?

Q. Yes sir.

A. About five miles. We got the engine there at Gallup and started out of the yards; instead of going out the main line, the yard master told us to go down over Number Five. I was standing on the pilot of the engine while we were going over Number Five track expecting to throw the switch there, but got injured before I got there.

Q. Now when you got back after this engine, just state where you got the engine, and what was done before you started out by everybody who was in charge of it?

A. I got the engine from in front of the depot. One of the switchmen had brought the engine out, and I got the engine there and the yard master asked me how long it would be before we were ready to go. I told him probably two or three minutes, as soon as the conductors gave the orders.

Q. Where was the conductor at then?

A. In the office getting his orders. We were standing immediately in front of the office. One of the switchmen told me we would have to go in on the scale track down there.

Q. Who moved the engine up there?

A. The engineer. One of the switchmen opened the switch and let us in there. We stopped there waiting until the conductor came. In the meantime the yardmaster had told me that we would
50 have to go down number five, the main line was blocked, and to leave the switch open, not to close any switch, "to leave the switches as you open them." As quick as the conductor came I got up on the pilot ready for this switch.

Q. Where did you get on the pilot?

A. On the foot board.

Q. Tell the jury how that pilot was made, where you were standing?

A. The pilot was made of slats, horizontal slats, I was standing on the second slat, two slats from the bottom are kind of cut out, leaving a place for a foot board.

Q. Which side is that?

A. On the right side of the engine.

Q. Which side was this foot board?

A. On both sides, but I was standing on the right side.

Q. Why were you standing on that side?

A. I was standing on that side because that is the engineer's side, on the right side.

Q. You know what the foot board was put there for?

A. Yes sir, to ride on.

Q. For who?

A. Brakemen or conductors or trainmen.

Q. You say you got on this step there then what did you do?

A. On that step?

Q. Yes sir.

A. I stood there.

Q. State whether or not you gave any signals to anybody?

A. I gave the engineer a signal.

Q. What was the signal?

A. I gave him a signal of already, to go ahead. After the conductor got his orders and came down there.

Q. What were your duties with reference to moving that engine?

A. My duties were to throw all the switches, open them and close them

Q. How many brakemen did you have at that time?

A. We had only one with the engine.

Q. Who was that?

A. That was myself.

51 Q. Where was the other brakeman?

A. The other brakeman was at the West yard taking care of the train.

Q. What was your position on the train, front or rear brakeman?

A. Head brakeman.

Q. Now then, just go ahead, after you started out, what happened. Tell how you got hurt.

A. Well, I was standing on the pilot, we went down through the yard there, got right close to this switch, and I was looking for the switch, rather to see how the switch was, all at once the engine ran right up in front of the frog, the pilot kind of ducked—dipped down on the rails, scrapped down on the rails, and hit the frog and injured my foot.

Q. Tell the jury how your foot was caught.

A. Caught between there and the end of the pilot.

Q. What effect did it have on the pilot?

A. It broke the pilot, broke the bottom slat, and the next one, bent them in and up, both of them.

Q. When your foot was caught, then what did you do, or what did you attempt to do?

A. I attempted to get away. I did evidently get away for the engine ran some short distance without me, I jumped and fell down.

Q. You know what caused the pilot to go down towards the rails?

A. Yes sir.

Q. What was it?

A. I think it was on account of the low joints in the track there.

Q. What do you mean by low joints?

A. I mean where the track is soft and goes down. Where the joints are low, uneven, don't stand up like the balance of the track. The engine strikes them, the great weight of the engine—when the forward truck strikes this low track it lets the engine down and the pilot down on the rails.

52 Q. State whether or not the pilot struck the rail before it struck the frog?

A. Yes sir.

Q. Why didn't you get off before it struck the frog?

A. Couldn't, did not have time, could not get off, did not see it in time, could not have time to get away.

Q. Have you got the show?

A. Yes sir.

Q. That the show you had on at the time of the accident?

A. Yes sir, that is the shoe.

Q. Now, just tell the jury to what extent that foot was hurt.

A. My foot was amputated,—I don't know what you call it—amputated—at first my toes were torn clear off, when I went to the hospital they dressed them there, trimmed them up. They were torn clear off, right at the time of the accident.

Q. Where were your toes?

A. They were left right there on the track, right there, until one of the switchmen buried them next day.

Q. How are they cut off?

A. Cut off right across here.

Q. Where would you say that was?

A. That is the instep there.

Q. All of your foot from the instep towards the toes are gone?

A. Gone from here out.

Q. From the instep to the toes all gone?

A. Yes sir, it is entirely gone to the back of the toes.

Q. What effect does that have on you in walking, getting around?

A. Has the effect of making me a crippled, and less able to get around as much as I used to, cannot run, cannot jump, and it makes me lame.

Q. Had you ever been notified of this low joint or soft place in the track?

A. No sir.

Q. State whether or not you kept a lookout ahead?

A. I was keeping a good lookout ahead.

Q. You notice the frog?

A. I noticed the frog, but it looked all right.

Q. You notice the cowcatcher and engine when you got on it?

53 A. Yes sir.

Q. State whether or not there was anything the matter with it.

A. There was not a thing wrong with it as far as I could see.

Q. Now how long had you been working for the Santa Fe at the time of the accident?

A. I started to work for the Santa Fe on the 26th day of February.

Q. At the time of the accident — you familiar with the rules of the company?

A. Yes sir.

Q. State whether or not they had any rules or regulations to your knowledge prohibiting brakemen from riding on the pilot?

A. Did not.

Q. Ever read the rules before?

A. Have many times.

Q. Why did you ride on the pilot?

A. I rode on the pilot because that is near my work, where I am supposed to be getting to switches.

Q. I will ask you to state whether or not it is necessary for you to ride on this pilot at that time?

A. Yes sir, I considered it necessary for me to ride on there.
Q. Why?
A. I considered it necessary for me to be on there because I have to be right down close to my work, right where I could get at this switch quick; had I been back in the gang way, I would have been unable to see this switch, the majority of those engines are steaming so bad you could not see ahead of the engine.

COUNSEL FOR DEFENDANT: No allegation here about the bad condition of the engine.
COUNSEL FOR PLAINTIFF: We have alleged, may it please the court, that Mr. Sowers was in a proper place; we are not showing negligence in the engine steaming.
COURT: I will overrule the objection.
COUNSEL FOR DEFENDANT: Except.

Q. Just state again why you did not get on the engine, why you could not see the switch from the gang way?
A. I got on the foot board because I have to be closer to do
54 the work, and see ahead and see the switch, where I could get at my work in less time.
Q. How far om where you stopped, you got off, from the switch, that you had to stop at,—at the time the accident occurred?
A. I think some- like seventy-two, three or four feet.
Q. Before you would have gotten off?
A. Yes sir.
Q. How many switches would it have been necessary for you to open before you could have got your engine on the main line?
A. It would have been necessary to open five switches.
Q. Five switches?
A. Yes sir.
Q. Which switch was this? Which frog was it you crossed with reference,——
A. We were crossing the frog on number five track, between number five and number six track.
Q. I will ask you if you crossed any frog before you got to this one?
A. Not in the West end of the yards.
Q. Had you in the east end of the yards?
A. Yes sir.
Q. When you got on the cow-catcher to ride down through the yards, did you know at that time about where the switches were located?
A. No sir, I did not. I knew where the main line switch was. I knew about where Number three switch was. That is all of them I had ever taken any notice of.
Q. Had you ever been over this track number five before?
A. That was the first time I have been down there.
Q. The first time you ever been over that track?
A. Yes sir.
Q. Look at that picture and state whether or not that is a correct representation of the yards.

A. Yes sir.

Q. Just come down here. On this picture is marked track No. — what is the track number?

A. It is not numbered. The main line.

Q. Which way that picture shows, east or west?

55 A. That picture was taken look- west.

Q. Now show the jury just where the frog was that caused the accident.

A. Right here.

Q. With reference to those rails, state whether or not they are long or short rails?

A. This one. There is a short rail right there. You can see that rail there.

Q. What rail are you talking about?

A. The short rail between this frog and the end of the first long rail.

Q. Where does that go?

A. Goes out here, out the west end, over the main line here. Here is the frog right here. Goes out the main line right here.

Q. Which way were you going down this track?

A. Going down this track between the two rails here.

Q. Are these pictures a correct representation of the yards?

A. Yes sir, that one is, and that one—yes sir.

COUNSEL FOR DEFENDANT: The picture showing this particular place we have no objection to that.

A. That shows track number five.

Q. These are all looking West?

—. No sir.

Q. I mean those look—I will ask you whether or not you noticed the track,——

COUNSEL FOR DEFENDANT: We object to the introduction of any of these pictures because none of them show the place of the accident.

COURT: What do you expect to show by these pictures?

COUNSEL FOR PLAINTIFF: The yards.

COUNSEL FOR DEFENDANT: The yards are not in question at all. We object to those pictures.

COURT: I will sustain the objection. Gentlemen, those three pictures will not be in evidence, and you will not regard anything you may have seen in them for any purpose in this case.

Cross-examination:

Q. When were these pictures taken with reference to the date of the accident—the picture number one there?

56 A. Taken about forty days after the accident,—thirty or forty—I don't remember just the date.

Q. As much as forty days?

A. Well, it may have been less than that.

Q. Before or after you left the hospital?

A. It was after I left the hospital.

Q. You had them taken?

A. Yes sir.
Q. By whom?
A. By —— —— who works at Gallup.
Q. When did you leave the hospital the first time—at what time?
A. I left the hospital, I think, on the 25th of May, I think that was the date.
Q. This accident happened when?
A. The 30th day of April.
Q. That would not be forty days. Are not you mistaken when you left the hospital?
A. I may be mistaken about the date I left there, it was before the first of June, I know that.
Q. How many days after you got to the hospital?
A. 25 or 26.
Q. Went in there about the 1st day of May, did you, about?
A. Yes sir.
Q. Where is the hospital?
A. Albuquerque.
Q. Then you got out on what date?
A. I don't remember what date it was. I did not bring the discharge I got there with me—before the 1st. of June, I know that.
Q. How many days after that before this picture was taken?
A. I don't remember, very soon, right soon after that time, was not more than forty days.
Q. As much as forty days?
A. Yes, probably as much as forty days. I mean from the time I was injured.

COUNSEL FOR DEFENDANT: We object to the picture being introduced for the purpose of showing the conditions at the time
57 of the accident; forty days is too long a time to tell the condition of the track on the 30th day of April.
COUNSEL FOR PLAINTIFF: This picture represents the location at the time or about the time of the accident.
COUNSEL FOR DEFENDANT: We do not object to them showing the location.
COURT: In the absence of the testimony the objection is good.

Redirect examination:

Q. State whether or not this was day or night time?
A. This was in the night time.
Q. When you started down the track did you notice the condition of the track?
A. No sir. I noticed—always supposed to be a good track—I did not notice any difference in the track.
Q. You notice any difference in it?
A. No sir, I did not notice any difference of any kind.
Q. How far had the engineer or the engine moved or ran, after the pilot struck the frog?
A. It did not run very far, probably five or six feet.
Q. How do you know?

A. I know it when the engine—when the pilot had passed far enough from the top of the rail to release my show—release my foot.

Q. Which way did you jump then?

A. Jumped off to the right, right over the track.

Q. How did you get over there?

A. I just jumped over far enough.

Q. I mean after you were hurt?

A. The engine backed up and they put me right back on the pilot.

Q. You rode back on the pilot?

A. I did.

Q. You examine the pilot?

A. Yes sir.

Q. Now what was its condition?

A. It was broken.

Q. Now, at the bottom of the pilot, what was it, wood or iron?

A. Both, heavy wood on the bottom of it, and a heavy iron band around the bottom.

Q. With reference to that iron band, what was its condition?

58 A. It was bend back in and up.

Q. Did the beam run down like this or run across here?

A. Ran across here,—wait, that way, horizontally.

Q. In other words, you mean it ran *parallel* with the rails?

A. Yes sir.

Q. I mean, with the ties?

A. Yes sir.

Q. What kind of an engine was this?

A. It was a passenger engine.

Q. With reference to weight?

A. I don't know about the weight. I know the number of the engine was 1133, one of the big engines; I think they call them a Pacific type engine.

Q. I will ask you whether or not you ever heard or saw any of the other employees—ever hear of conductors riding on the pilot?

COUNSEL FOR DEFENDANT: Object to the testimony, what he had ever heard, what somebody else done frequently would not justify what he done on this occasion.

Q. I will ask you whether or not you are familiar with the customary place and practice of the brakemen and conductors in riding while doing work in the yards?

COUNSEL FOR DEFENDANT: Object to that—customary place for other people to ride—other people may have habitually ridden in dangerous places, it would not authorize him in doing so.

COURT: Overrule the objection.

COUNSEL FOR DEFENDANT: Note the exception. This case is not being tried under the laws of Texas, but under the law of the United States, which — the common law.

Q. I will ask you if you are familiar with the usual and customary

place and practice of the brakemen and conductors in riding in doing their work in the yards?

A. Yes sir.

Q. I will ask you whether or not it is usual and customary for brakemen and conductors when doing the work in the yards to ride on pilots of engines?

A. Yes, sir, it is.

Q. How long, to your knowledge, has that been the usual and customary practice?

59 A. Been the usual and customary practice ever since I have been connected about railroads. Ever since I worked on railroads. Been the usual and customary practice I know for over a year longer than a year.

Q. On the Santa Fe?

A. Yes sir. Sometime previous to the time I worked for them and since—done every day.

Q. I will ask you whether or not you suffered any pain by reason of that injury at the time or since that time?

A. Yes sir, I have.

COUNSEL FOR DEFENDANT: The gentlemen have introduced and made part of their case a notice. The notice says nothing about any injury or damage by physical pain or mental suffering and to save the point we make that objection, and no notice of that kind has ever been served upon the agents of the company, and no matter of that kind could be proved or establish- in this case.

COURT: Overrule the objection.

COUNSEL FOR DEFENDANT: We except.

Q. Just state the extent of your sufferings?

A. Well, I suffered—I don't know how to state that.

Q. Just in your own language—you know how you suffer-?

A. I suffer- the amputation of that part of my foot, by having it torn off that night, and by being a little more than three months on crutches, and ever since that it has bothered me.

Q. I mean pain; you suffer pain?

A. Yes sir, I have complained of it.

Q. I will ask you whether or not it pains you yet?

A. It does, yes sir.

Q. To what extent; what is the cause, if you know?

A. On account of those toes being cut off there, I think is the reason of the pain now.—whole lot besides that, a man has to go through the world a cripple.

COUNSEL FOR DEFENDANT: That is argument, we object to the argument.

—I naturally feel that I am not ablebodied like other men; I am not like I used to be.

Q. I will ask you whether or not you had accepted the railroad business as your profession?

60 A. Yes sir.

Q. State whether or not you expected to follow railroading?

A. I did.

Q. The balance of your life?

A. I did expect to follow railroad- always.

Q. Have you any other profession or calling?

A. No sir.

Q. I will ask you to state whether or not you are familiar with the examination—or physical condition now necessary to secure employment on all well regulated railroad- in the United States?

A. Yes sir.

Q. State whether or not anyone having this injury you have got can stand a physical examination for employment as brakeman or any other employment on the railroad, by railroad company?

COUNSEL FOR DEFENDANT: We object to that. The petition is silent upon that subject. He says he is incapacitated for railroad service. Nowhere does it say anything about the inability of the plaintiff to stand an examination for railroad work.

COUNSEL FOR PLAINTIFF: We will withdraw that question.

Q. You are familiar with the duties of conductor and brakeman are you not, Mr. Sowers?

A. Yes sir.

Q. You know what is necessary for them to do when they are performing duty on a train?

A. I do.

Q. I will ask you to state whether or not with your condition with that foot off, you could perform the duties of freight brakeman?

A. No sir, could not.

Q. Why not?

A. Because I could not get around to do my work, could not get on and off cars like freight brakemen have to.

Q. I will ask you to state whether or not you have secured any permanent employment since you were hurt?

A. No sir, I have not.

Q. Have you made any effort?

A. Yes sir.

Q. What lines have you tried to get into?

A. I have tried to get into different stores in town where I
61 have lived since, Winslow, and have tried other places. Tried to get into the ice plant there.

Q. Did you get any kind of employment?

A. I have worked some since, yes sir.

Q. In what capacity?

A. Worked in saloons there.

Q. You did that from necessity or from choice?

A. I done that so I could get something to eat. I done that to make a living.

Q. Now, Mr. Sowers when this pilot struck this frog what effect

did it have on the engine with reference to whether it was an easy—strike easy or hard jar?

A. It jarred the engine all over when it struck.

Q. When the cow-catcher first went down what did you think was the matter at that time?

A. When the cow-catcher first struck the rails, I thought that the wheels had dropped off the rails, and the pilot scrapped along on the rails. I thought the wheels ran on the ground, on the ties, when the cow-catcher struck the frog.

Q. Why didn't you get off at that time?

A. Didn't have time.

Q. Do you know from your experience in railroading or can you tell when you are riding on an engine when it strikes a low joint or a low place in the track?

A. Yes, sir, I can.

Q. You say this was a low place in the track?

A. Yes sir.

Q. What causes low joints?

A. Well, it is the track—I don't know how to explain that.

Q. Just in your own language?

A. It would be better—any kind of soft material underneath the ties, when the engine runs up on that it would drop in, while the other part of the track would be still firm and solid.

Recross-examination:

Q. Mr. Sowers, you say you have been railroad- how long?

A. I have been railroading very nearly three years.

Q. You say steadily three years?

A. No sir, not steadily three years.

62 Q. What day did you begin to railroad?

A. I began to railroad on the 9th day of March, 1899.

Q. '99?

A. Yes sir.

Q. Where?

A. What did you say?

Q. Where?

A. Tacoma, Washington.

Q. What is that paper?

A. Northern Pacific Clearance.

Q. What kind of railroading did you do there?

A. The clearance shows passenger brakeman, part of the time I was passenger brakeman and part of the time freight.

Q. How old were you then?

A. Twenty years old.

Q. How old are you now? What had you been doing up to that time?

A. Been working on the Northern Pacific coal mine.

Q. In what capacity?

A. Working, doing everything around there—working in the shop.

Q. That was six years ago?
A. Yes sir.
Q. Now since that time you have spent as much time at other vocations as you have at railroading?
A. I spent that much time idle, you mean to say?
Q. Idle?
A. Some of it idle, some of it I work.
Q. Did you work whenever you could. You were not around waiting for railroad jobs this three years you were not working at railroad work, were you?
A. Not necessarily. That is, I was not looking for them all the time, for some reason, I had to work at something else when I could not get railroad jobs.
Q. When did you leave the Northern Pacific—where did you go?
A. Went down into California.
Q. What did you do there?
A. Did not do anything there for six or seven months.
Q. Why?
A. Did not want to.
63 Q. Did not have to work?
A. I had some money, was not hunting a job particularly. I worked in Los Angeles four days and quit there, did not like the job.
Q. What kind of work? Then where did you go?
A. Then I came over into New Mexico.
Q. Where did you work there?
A. I worked at—went to work for the Alamogordo Lumber Company shortly after that.
Q. In New Mexico?
A. What is that?
Q. Alamogordo Lumber Company.
A. No sir.
Q. Yes it was.
A. Yes it was.
Q. How long did you work there?
A. I worked there eighteen months.
Q. What years?
A. I told you that was in the month of—I worked say before that after I came down from Washington, I worked in Gallup.
Q. Why didn't you say so?
A. I forgotten about it, that is the reason.
Q. Well, go ahead, what did you do?
A. I worked in Gallup for Tom Hines.
Q. What did you do for Tom Hines?
A. I worked there for him tending bar.
Q. How long?
A. I don't remember just how long I did work there, I worked one summer; worked part of the time for him, and worked part of the time there at Albuquerque for Henry Hills, and part of the time for Frank Fair.
Q. What does Frank do?

A. He runs a restaurant there, a restaurant and saloon.
Q. Working in the saloon?
A. I worked in the saloon.
Q. Work for Henry tending bar?
A. Yes sir.
Q. How long?
A. I don't remember just how long, three or four months.
64 Q. What did you get for that?
A. What did I get for my time there?
Q. Yes sir.
A. I think I got $50.00 a month.
Q. Go ahead and tell us what other places you worked?
A. I went back East looking for a railroad job. I did not find any, I went to three or four different places, for awhile I worked in Iowa for a construction company there, worked along three or four months there, until I came to Alamogordo. It shows here I went to work for them in 1902.
Q. How long did you work for them?
A. I worked for them until December 18th, 1903.
Q. In what capacity?
A. Log train brakeman.
Q. Did you work from February 1st, 1902, to May, 1902, as a lumber man under Lew Taylor?
A. How is that?
Q. Did you work from February 1st, 1902 to May 1st, 1902, as a lumber man under Lew Taylor?
A. I did not.
Q. Did you work under Lew Taylor?
A. I worked under Lew Taylor.
Q. Did you work from June 1st, 1902, to December 15th, 1903, as log train brakeman under Lew Taylor?
A. From when?
Q. From January 1st, 1902 to December 15th, 1903.
A. No sir, I worked from June 1st.
Q. June, I guess it is. Did you work from December, 1902, to December 15th, 1903, as a lumber man?
A. Not all the time.
Q. Where were you working in February, 1905?
A. Working for the Atchison, Topeka & Santa Fe Railway Company.
Q. Where?
A. Latter part of it?
Q. Where?
A. Where?
Q. Yes sir.
A. I was working out of Winslow.
65 Q. When did you go to work at Winslow?
A. 22nd of February.
Q. Where did you go from?
A. I came from Gallup.
Q. What doing at Gallup?

A. Working for Johny Gordon.
Q. What was his business?
A. He is a hotel and saloon man.
Q. That your name?
A. Where, here?
Q. Yes sir.
A. Yes sir, that is my name.
Q. Did you sign it?
A. I did.
Q. Did you write it—did you write that?
A. I wrote all that application.
Q. Is it true?
A. What? That?
Q. Yes sir.
A. Some of this, all except that, I had to make my time go somewhere, I did not put in all the places I worked at all. Just went to work and filled that application in.
Q. That tell the truth or not?
A. Which?
Q. This?
A. No sir, that is not the truth of where I worked there, so far as that is concerned. I filled this application up very good I believe—I laid around Gallup waiting for a job a long time.
Q. Then this statement is not true?
A. Majority of that is, most of it is.
Q. Tell the jury what is true and what is not true.
A. My Northern Pacific statement is true, and my time as log brakeman there.
Q. You log train brakeman from February, 1900, to May 1st, 1902?
A. Here is the clearance I got from the company.
Q. I don't care anything about the clearance. As a lumber man under Lew Taylor, is that true?
66 A. I don't remember the date I went to work for Lew Taylor.
Q. Then this is not true. You did not work two years as a lumber man?
A. No sir.
Q. Is it true that you worked from December, 1903, to February 15, 1905, as a brakeman under W. H. Wright?
A. Not all of it, no sir.
Q. What time did you work?
A. I worked up there about thirty days.
Q. This says from February 30th, 1903 to February 15th, 1905, how much of that is true?
A. How is that?
Q. December 30th, 1903, to February 15th, 1905, that is a year and,——
A. Something over a year.
Q. A year and two months, that true?
A. That I worked as a lumberman?

Q. That length of time?
A. No sir, I did not work up there.
Q. That is not true?
A. Did not work up there.
Q. You made this statement for the purpose of getting a position did you not? With this railroad company?
A. I made that—I filled up that application because it was necessary for me to fill that c in order to go to work.
Q. Was it necessary to show you had been employed all the time?
A. It was necessary for me to show that I had been employed somewhere, yes sir.
Q. Now, you say you worked for the Santa Fe Company—this company you were working for when you were injured—from February the 15th, 1905? You made that statement awhile ago?
A. I said what?
Q. I will ask you to state what time you went to work for this defendant company?
A. The 22nd day of February, 1905.
Q. You told them on the 22nd you had quit work February the 15th as lumber —?
A. I don't remember what I told them.
Q. That was not true?
67 A. I did not quit as lumber man, no sir.
Q. Had not *me*-n lumber man for how long?
A. Several months back.
Q. Had you ever been lumberman?
A. I had worked in the lumber woods a little, yes sir
Q. Is not it a fact you did nothing up there but railroading?
A. No sir.
Q. Did you work out in the woods, handling logs, help to bring them to the train?
A. Yes sir.
Q. Under whom?
A. I don't know what his name was, Samson.
Q. How long did you labor up there?
A. I don't remember how many months it was, don't remember.
Q. Tell us approximately. Guess at it as near as you can.
A. Well, I must have been there several months, probably five months.
Q. Why did you not awhile ago in your direct examination state that you had worked off the railroad up there?
A. Don't know, I was not asked that question.
Q. For the Alamogordo Company?
A. I don't know, I was not asked that question.
Q. Then if you — a lumberman you were not railroading, were you?
A. Not if I was a lumberman, but I was not a lumberman all that time
Q. Were you railroading all the time which you stated?
A. Was I railroading all the time which I said I was?
Q. Yes sir.

A. I can show you here how much time I was railroading.

Q. I don't care how much time you can show, I want to know whether or not you worked all the time you stated in that application?

A. I don't know how much that application says.

Q. Tell us just what you wrote? Were you railroading the length of time you stated in that application?

A. I don't know what is on that application.

Q. I will let you have it again.

A. Yes sir, I was a railroad man all that time, and some more.

Q. Where?

68 A. Well, I worked on the Northern Pacific a short time after that, after I quit the passenger service there I worked on the Northern Pacific a very short time as a switchman at Roswell.

Q. Why didn't you put it in this application?

A. I didn't want to, I guess.

Q. Why didn't you put in more railroad service and less lumberman service?

A. I don't remember, I don't remember anything about that—I remember making that application, I filled that out.

Q. Try to tell the truth.

A. I filled that application out for a position on the road.

Q. Did you tell them you had been a saloon keeper?

A. No sir.

Q. Why?

A. Because I have never been a saloon keeper.

Q. Tell them you had been a bar tender?

A. I did not.

Q. Why?

A. Because I did not want to.

Q. You tell them you had kept a gambling—run a gambling place?

A. I did not, because I never kept one or run one.

Q. Never kept one?

A. No sir.

Q. Nothing to do with gambling in any capacity?

A. No sir.

Q. What are you doing now?

A. I am working in a saloon up there since I been injured.

Q. Haven't you worked right along in a saloon ever since you were ordered out of the hospital.

A. Not all the time.

Q. How long have you worked?

A. I don't know how many days. Those saloon men have been very kind to me up there, and give me preference to make a few dollars.

Q. You get about three dollars a day up there, don't you?

A. Yes sir, when I work.

Q. What are your duties.

A. I am supposed to stay there and keep the bar, when I am

working, at that kind of business, until another man goes to work.

69 Q. You say there is no gambling in that saloon?

A. There is.

Q. When you are on duty don't you keep the gambling?

A. I do not.

Q. Who is keeping the gambling?

A. Somebody else keeps charge of the gambling.

Q. Who?

A. According to where I work.

Q. At the place where you worked when you came down here the other day?

A. The last place I worked Mr. Brown kept the place.

Q. Where?

A. In Winslow.

Q. What were you doing there?

A. Tending bar for him.

Q. What time, day or night?

A. Night.

Q. All night long?

A. Yes sir.

Q. Are not you in charge of that saloon at night?

A. I am in charge of the bar.

Q. Nothing to do with any other feature of it?

A. No sir.

Q. Nothing whatsoever?

A. No sir.

Q. What did you do at Albuquerque before you went to work at Steck's?

A. I worked there for George Minor awhile.

Q. Bar tender?

A. Yes sir.

Q. You are as good a bar tender now as you were then?

A. I never was a very good bar tender.

Q. Follow it for your health?

A. Followed it to make a little money, never followed it as a profession.

Q. Followed the railroad to make a little money?

A. No sir, I followed railroading because I wanted to be a railroad man.

70 Q. Why didn't you keep at it?

A. I always quit to get a better job.

Q. Did you consider the lumber business bigger than the job as brakeman?

A. No sir.

Q. Why did you do it?

A. I did not have a job at railroading.

Q. Why did you spend two years with the Albuquerque Lumber Company?

A. I had my job up there as log train brakeman.

Q. I know, I am speaking about the two years in the log camp?

A. I did not spend two years in the log camp.
Q. That is a mistake in the application?
A. Must be.
Q. Didn't do it. The wheels of the truck upon which—the wheels — your engine you rode down, touch your foot?
A. How is that?
Q. The wheels of the truck from which—the wheels of the engine you were riding on the night you were injured, did not cut your foot?
A. I don't think the wheels touched my foot, no sir.
Q. Then your foot was cut by a part of the track—was struck or cut by some part of the track, other than the rails upon which the wheels were running?
A. If you consider the frog part of the rails that the engine was running on, it did.
Q. Well, I am not—well, I am separating now the frog from the track upon which the wheels ran, separating the two—then the rails upon which the wheels ran did not strike your foot?
A. No sir.
Q. Then your foot did go between the pilot and the rail upon — the wheels was moving?
A. No sir.
Q. Necessarily, then, your foot struck some other obstruction?
A. Yes sir, struck the frog.
Q. You *peal* in your petition your foot either struck the guard-rail or the frog; you know the difference between the guard rail and the frog, don't you?
71 A. Yes sir.
Q. Why did you say one or the other struck your foot?
A. I pleaded the facts in the case, I say my foot struck the frog.
Q. Didn't you say in your petition this—you read it over when it was written—either the guard rail or the frog—you allege —. ——.
Q. You heard it read?
A. Yes sir.
Q. You — familiar with the contents of your petition? Now you say that your foot struck the guard rail or the frog?
A. I left that to my lawyers.
Q. But you helped write the petition, you say?
A. Yes sir.
Q. Then you read it to yourself, didn't you. Now, a guard rail and a frog are separate and distinct features of appliances are they not?
A. Yes sir.
Q. Not on the same side of the track?
A. No sir.
Q. On opposite sides of the track?
A. Yes sir.
Q. If the frog is here, where sets the guard rail? This is the right hand side of the track. If the frog is here, where is the guard rail.

A. That photograph will show you there, one right opposite the other.

Q. Over here?

A. Yes sir.

Q. If the frog is here,—track four feet and eight inches wide—*four feet and eight inches wide* then the guard rail is over here about four feet and two inches, isn't it?

A. I don't know the distance.

Q. You know how wide a railroad track is, don't you?

A. Yes sir.

Q. You ought to be able to tell me all about these things. If the frog sits here the guard rail sits over against another rail?

A. Yes sir.

Q. You rode right side of the engine?

72 A. Yes sir.

Q. With your feet somewhere near the rail on the right side?

A. Yes sir.

Q. Now, the frog was on the left side of the track—near the left rail—or guard rail? You were going West?

A. I will show,——

Q. You were going West?

A. Yes sir.

Q. Now, did your foot pass over the frog or the guard rail?

A. Part of my foot went to the top of the frog, part of it did not.

Q. You know the frog was on the right hand side?

A. I know that the frog was on the right hand side. The frog was on the right hand side of that pilot in here—the pilot sits like this.

Q. Your foot then was right over the wing of the frog?

A. Yes sir.

Q. The wing of the frog is part of the frog?

A. Yes sir, part of the frog.

Q. It is put there to guide the wheels through the frog?

A. Yes sir, is put there to guide the wheels through the frog.

Q. That is correct, is it.

A. Yes sir.

Q. Now, that frog is made al- together. Spiked down there al- together, is it not?

A. The frog?

Q. The frog?

A. Yes sir, supposed to be.

Q. Now prior, you say—prior to the time you got to this frog you felt the engine go down?

A. I did.

Q. You had an electric head light in your engine?

A. We did.

Q. Bright electric head light?

A. Yes sir.

Q. You knew where the frog was?

A. I did.

Q. You knew where the next switch was?

A. Yes sir.

Q. You could see them. You carried a lantern?

73 A. Yes sir.

Q. This pilot, you say, was in good condition?

A. I don't know whether it was or not, it looked al- right to me when I got on it—it looked good.

Q. It was your duty to know whether it was al- right or not?

A. It looked good to me.

Q. It is put how high above the rails?

A. I think the standard is about four inches. Now, I am not positive of that.

Q. Isn't it practically two and a half?

A. It is more than that, I think, about four inches, I think, is the height above the rail.

Q. You say that the pilot was al- right?

A. So far as I know it, the pilot was al- right.

Q. You were expecting to alight from that pilot to open the switch?

A. Yes sir.

Q. You had your back to the engine?

A. I did.

Q. Your face forward?

A. Yes sir.

Q. You were holding to the rod on top of the pilot with your left hand?

A. Yes sir.

Q. You turned your left side back to the engine in a manner,——

A. Not necessarily.

Q. You were leaning backwards towards the engine to some extent, were you not?

A. I was standing straight up on the pilot, as I remember.

Q. You standing right straight up?

A. Yes sir.

Q. You felt the pilot scrap- the rail, you say?

A. I did.

Q. Before you got to the frog?

A. Felt the pilot strike the rail.

Q. This engine was not going over three miles an hour was it?

A. Yes sir, little better than that.

Q. Four?

A. Yes, a little better than four. A man is supposed to

74 walk about four miles an hour, and they were going a little faster than a man could walk.

Q. Tell the jury how it stopped in three or four feet? Tell the jury how the engineer could stop in three or four feet in they were going more than three or four miles an hour?

A. Did I say awhile ago it stopped in three or four feet?

Q. Yes sir.

A. I did not.

Q. What did you say?

A. I said it stopped a few feet after it struck the frog.

Q. How many feet?
A. I don't know how many feet, they only went a few feet passt me—the frog.
Q. You know—tell the jury before——
A. He started to stop the engine before he got to the frog, before even we struck, on account of the scrapping of the pilot on the rail, but it was before I had time to get off.
Q. You say on account of the scrapping the engineer started to stop the engine?
A. He did.
Q. He felt the jar?
A. Yes sir.
Q. After feeling the jar and the scrapping on the rails, he started to stop?
A. He did.
Q. Had almost stopped the engine?
A. No sir, had not almost stopped it.
Q. Tell the jury how far the engine went passed the frog.
A. That is something I cannot tell you, something I cannot say.
Q. Estimate it?
A. I cannot estimate it.
Q. Look around and point out some object.
A. Not as far as that chair, may be a little further,—may be not quite so far.
Q. Five or six feet?
A. Something like that.
Q. Stopped?
A. He applied the brake right quick. He did not stand
75 right there because I know I jumped right there at the frog and the pilot ran beyond me a little ways. When I went to get on the pilot again they came down from the engine, they backed up and stood along on the right hand side of me.
Q. How much of the engine passed you when you fell and hit the ground?
A. Along about the cylinder.
Q. Along about the cylinder, say about four feet back?
A. I don't know what the measurements are.
Q. Can't you tell the jury, being a railroad man—can't you tell the jury how far the cylinder is back of the pilot—back of the end of the pilot?
A. Probably six feet or eight.
Q. You fell down you say?
A. I fell down immediately. When I got on the ground I jumped about two or three jumps and went down.
Q. Fell, you say, the first time?
A. Yes sir.
Q. You say the pilot was not bend down, but bent up?
A. It was bent up.
Q. Now the end of that wing of the guard rail sits straight up like that, don't it?
A. How do you mean?

Q. Say this is the wing of the guard rail?
A. Yes sir.
Q. I mean the wing of the frog. Say that is the wing of the frog. The end is sawed off straight is it not?
A. The end—at the end of the frog?
Q. Yes sir.
A. Yes sir, supposed to be.
Q. If that be the wing of the frog and your foot struck—we will illustrate better like this, so the jury can see. We will make this the rail, this is the West now, mind you. We will make this the wing, guard rail over there, and we will make this the track. The wheels would pass westward over this track, and the flang was between this and that—that right?
A. Could be like that.
Q. The end of the frog be like that?
76 A. Yes sir.
Q. Here it is straight, that rail, is it not, then it turns around the end?
A. No goes out the other way.
Q. In the middle it runs parallel along with the rails?
A. Comes in here, then goes out.
Q. This end of the wing is perpendicular?
A. This is straight.
Q. This is the pilot of the engine?
A. Al- right.
Q. You were standing right there on the pilot, that a fact?
A. Yes sir.
Q. Now, if this pilot had struck this rail before getting to the guard rail, it would have remained on top of the rail—it reaches beyond the rails, on the side?
A. The pilot?
Q. Yes sir.
A. Yes sir.
Q. Reaches beyond the rails?
A. Yes sir.
Q. Now, this is that foot right way. This the way the show stood, now if this is the rail,—this, now is the wing of the frog. If this rail had raised the track—raised the pilot when it scrapped and bent it inward would not it have raised your foot upward?
A. Do that again?
Q. If this pilot is raised up by striking this rail,—this is the main rail?
A. Yes sir.
Q. Would it raise your foot?
A. My foot was on the ground.
Q. Now, your foot was on that——
A. On the pilot, I mean.
Q. If this rail raised the pilot this way, why didn't it raise your foot up the same may?
A. I do not know that it did raise my foot up, I don't know it did raise the pilot.

Q. Now this is the left hand side with your engine, Mr. Sowers?
A. Yes sir.
77 Q. You are mistaken are you not about your foot?
A. No sir, not mistaken about my foot setting in, because the pilot did not stand like that, here is the pilot over here.
Q. This is the right hand side of the pilot right here?
A. Yes sir.
Q. There is the wing of the frog. You say that is what cut your foot?
A. Yes sir.
Q. That is right, is it. The wheel ran on this rail.
A. No, like that.
Q. No, that goes straight?
A. That is straight.
Q. Of course, you never could get like you were that other way. Now, you were standing immediately over this wing of the frog?
A. Yes sir, I must have been.
Q. Yes sir. Now, if the pilot dropped down so it would touch this rail before reaching the frog it bent the pilot up would it not raise your foot correspondingly?
A. Yes, but this rail did not bend that pilot, here is that rail that bent the pilot.
Q. Exactly.
A. This one right here.
Q. Yes sir, these two rails on a level?
A. I don't know that.
Q. You don't know that they were not?
A. I don't know that they were level, I don't know that they were not level, I know this rail struck the pilot, and had a tendency to bend it up, right in here, over the point of the rail, and struck my foot.
Q. Listen a minute. This frog was a level with that rail. The wing of the frog?
A. Yes sir, supposed to, all of them.
Q. Then if the pilot touched this wing, it would touch that rail also?
A. I don't know,—this particular frog?
Q. That is the only one you are supposed to know anything about?
A. I don't know that they are level.
Q. You brought a picture here showing that frog. Now if
78 that rail would strike the frog, would not it,—if the pilot would strike the wing of the frog, would not it strike the rail right along side of it?
A. I know that the rail, this frog, the facts show, was at least that much, half an inch higher than this main rail, that is, the point of it right here.
Q. When did you find that out?
A. I found it out just after the accident occurred. Just as quick as I could get back there and look at it.
Q. When you got out of the hospital, forty days?

A. No sir. Mr. Franklin was on the train at the time. I had an appointment to meet him in Gallup. I went down and examined the track myself, I did not make any examination of it, I noticed that much.

Q. Then there was only half an inch difference between the frog and the main rail?

A. All I could see.

Q. Only half an inch?

A. All I could see.

Q. Then the only difference in the two would be half an inch?

A. I don't know how much difference there would be having an engine on it.

Q. Did the switch ties run clear over the two tracks?

A. Supposed to.

Q. Is not it true that—that switch ties run clean through the whole thing?

A. Yes, sir.

Q. Then if the wing of the frog, and that main rail were upon the same ties,—they were on the same ties, they would practically — on a level, wouldn't they, Mr. Sowers?

A. No sir.

Q. Practically on a level?

A. They were not on a level.

Q. You are speaking of the difference you found to exist forty days after?

A. That much difference there—I cannot say how much difference there is when an engine is on there.

Q. You don't know that there is any difference?

79 A. I do know there is a little difference.

Q. The day referred to, you do not know that there was any difference?

A. I don't know there was any difference,——

Q. You say the pilot was pushed up?

A. Yes sir.

Q. Bent up?

A. Yes sir, broken.

Q. Now, Mr. Sowers, I will ask you, this is the front end of the pilot, like this, it is built just like this, in a diamond shape, is it, more or less?

A. Yes sir.

Q. Now the bands on that pilot, around the lower slat, form straight edge like this, don't they?

A. Yes sir.

Q. Straight edge, like that, each side is built like that?

A. Yes sir, I should say two inches and a half.

Q. Let me have your stick a minute.—I hope you can all see me here.—The pilot came along like this and it dips down and strikes that guard rail like that, that right, Mr. Sowers? This now represents the edge of the pilot, striking on the guard rail, two perpendicular rails, there, that right?

A. Yes sir.

Q. Struck the pilot?
A. Yes sir.
Q. Let me finish my illustrations. Would not the result be, Mr. Sowers, to cause the point of your pilot to go down rather than like that—would not the pilot, being a heavy piece of machinery with all this weight, would not it bend down like that instead of up?
A. Not necessarily, might have a tendency to jump over it.
Q. Would not jump over it until it hit it?
A. It did hit it.
Q. Would not the tendency be downward instead of upward without any other intervening cause?
A. I do not know about that.
Q. I cannot say it would not?
80 A. No sir.
Q. You were leaning forward expecting to step off, were you not?
A. I was expecting to get off.
Q. You had your lantern in your hand?
A. My right hand.
Q. You had this hand back on the rod, that hand holding on to this pilot?
A. Yes sir.
Q. That right?
A. That is right.
Q. What foot were you standing on?
A. Standing on my right foot.
Q. What foot?
A. My right foot.
Q. What was your left foot doing?
A. It was there too, standing on the pilot with the other one.
Q. What position was it in?
A. Right at the time I was injured, I think I had both feet right on the pilot.
Q. Standing just like that?
A. Yes sir, standing something like that.
Q. If this is the point of the pilot, Mr. Sowers,—excuse me—if that is the point of the pilot, this your left hand, you had this hand back here?
A. Yes sir.
Q. One here, here is your lantern here,——
A. Could not have had hold of the rod, it runs down on the pilot. I know I had hold of the rod, either turned this way, or turned this way or turned that way, I don't remember which.
Q. Yes sir, Now what is that here—put your back sort of like that. That is the wing of the frog—what is that here—*what* is how you were, isn't it?
A. Suppose so.
Q. That is your shoe?
A. Yes sir.
Q. That mark on the shoe——
A. Yes sir.

Q. What made that?

81 A. The pilot made that.

Q. What made that?

A. The end of the frog made that.

Q. Then Mr. Sowers, *if* you had got your foot between the end of that frog, wing of the frog and the pilot, didn't you?

A. Yes sir.

Q. Now there sits your foot. You say here is the mark. Here is the pilot which struck the rail?

A. Yes sir.

Q. Say there, put it just exactly like that. Now, here — what you struck. Loan me that cane a minute. If it was raised up by any obstruction such as this would not your foot be raised up with it?

A. Yes, but the pilot struck this in another way, somewhere, like that, I cannot explain to you just how my foot—how that come to cut my foot.

Q. I am going to explain to you pretty soon if you will let me. Am going to show you how you got hurt. I will show you that if your foot had remained on top of the pilot, you would not have been hurt. Now Mr. Sowers, your foot is here. Right over that way. Now you were expecting to alight there, were you not?

A. I was figuring on getting off, yes sir.

Q. To open the switch?

A. To open the switch.

Q. Now this pilot was found afterwards to be bent up. It was found to have been bent up afterwards?

A. That is the way I found it.

Q. Bent up. Was not mashed back to any extent, was it?

A. Yes sir, mashed back.

Q. Now, there and there, near the instep, there is this mark, isn't it?

A. Here.

Q. Right there, that point, isn't that where it hit?

A. No sir, hit up in here somewhere.

Q. What is the cause of that.

A. That is naturally in the shoe, I guess.

Q. Now, Mr. Sowers that was caused by some force, from what force was it?

82 A. That was the force of the pilot right in there, here,—my toe came in between there, then that would bring my toe down in here.

Q. Exactly, your shoe, that is, right like that?

A. Yes sir, I understand.

Q. You were standing there, you caught your toe like this—the pilot on which you stood?

A. You understand, when this pilot went scrapping along on this rail here, why my first impression was to get off if you find the engine is on the ground.

Q. Why didn't you jump off?

A. Could not get off, I got caught before I got away.

Q. You mean to tell the jury did not have time to jump off?

A. I was riding along there and my first impression was to get off.

Q. You do not know what position you were in?

A. I was standing right on the pilot. I could not get off because the pilot caught on before I had time or opportunity to get off.

Q. Why did you mention your impression of getting off?

A. I did not get off—the question was asked me there, I am trying to tell you.

Q. If your foot went down in that way, and you went over, Mr. Sowers, this was pressing then against your foot, your foot had not got free,—would not the tendency be to throw this pilot up?

A. I believe it would.

Q. Bend it upwards?

A. Yes sir.

Q. That shoe was only thing between the rail and the pilot?

A. Yes sir.

Q. You will admit that?

A. I will admit that.

Q. That shoe is not cut in two?

A. That is al- right.

Q. Then that shoe stood the pressure of that rail pressing against the pilot like that?

A. I- certainly did.

Q. If it stood the pressure, there was nothing between the pilot and that frog except your shoe and foot was there?

A. Nothing I know of.

83 Q. It did not cut your sole in two, did it?

A. Apparently not.

Q. So far as you know there was not a thing intervening between your foot and shoe, between the end of that pilot and end of that guard rail?

A. There was.

Q. What else raised that pilot except the *show of* your foot?

A. What pressed it?

Q. Tell me what else raised that pilot except that shoe?

A. The wing of the frog.

Q. Your foot was between the wing of the frog and the pilot?

A. Yes sir.

Q. What else raised that pilot except that?

A. Something else like that, hit it like that. This drugged right along on top of the rail. Now, this wing, it would have a tendency to strike this, and this lower slat——

Q. Yes I know, but what struck first, your foot or the pilot?

A. My foot in between the pilot and the frog.

Q. Exactly, your foot was right in between here; then your foot struck right there, I mean, that is where you lost your toes?

A. Yes sir.

Q. Right there?

A. Yes sir.

Q. Left them right on the track?

A. Yes sir, right on the track.

Q. Then that pilot drug you right over that rail like that?
A. Drug my foot right over that way until I could get it out.
Q. Then your shoe in this position, hanging right over that guard rail like that would raise that pilot up, wouldn't it? until you had passed over the guard rail?
A. I don't know about that.
Q. You were not released until you got over the length of this frog?
A. I was released—when I got my foot in that frog, like that—when it struck me I was not released until I got across that point.
Q. Illustrate with this?
A. This goes that way.
84 Q. Say that is the main rail?
A. That is the main rail, like this.
Q. Yes sir.
A. Say there is the point of the pilot, see here, that is the rail?
Q. Now, don't get your guard rail too close, the shoe has got to go in between there.
A. Plenty of room there. That is not right, go in between there.
Q. About how many inches before that foot was released, ten inches?
A. 12 inches, something like that.
Q. It drug you right down over that until you passed over the corner of the frog, didn't it?
A. Must have been more than that because it seems to me it drugged me there about two feet, I don't know how long it drug me.
Q. It had your foot like that, and threw you over, didn't it?
A. No sir, did not throw me over the engine.
Q. Your foot got down between the point of the pilot and this frog?
A. Did, certainly.
Q. It remained there until you were released?
A. I caught myself and jumped off to one side.
Q. Yes sir, Now the pilot, you say, was broken?
A. It was.
Q. Anything intervening between the end of the frog and pilot except this shoe?
A. What do you mean by that?
Q. I mean in between, intervening in between—nothing in between the end of the frog and the pilot except this shoe, right there—there is the print of it?
A. Nothing that I know of.
Q. And the rim of that iron band struck that gro-ve right there?
A. So far as I know.
Q. How thick is that rim?
A. What do you mean?
Q. How thick is that iron band?
A. That goes around the bottom?
Q. Yes sir.
A. About half an inch by two and a half, I think.

Q. Half an inch down this way, two and a half around this
85 way, that right?

A. The band around the pilot?

Q. Yes sir.

A. About two and — half inches up and down by half an inch thick.

Q. Sheet iron?

A. No, not sheet iron.

Q. The rim of the pilot?

A. Yes sir.

Q. What did you stand on?

A. Stood on the lower slat.

Q. Now, was it the upper or lower edge of the rim which was three inches wide, that cut that gro-ve in that shoe? There is the upper one, and there is the lower one there, which one cut the gro-ve in the shoe?

A. From the way the pilot broke around here, I was injured here, the way my toes laid on the track here, the way I remember it, I should say it was the bottom of the pilot.

Q. Bottom of the pilot?

A. I do not know just where.

Q. The shoe got under that way?

A. Yes sir, my—it turned out right under that way.

Q. What was that pilot made of, etc. them pieces, the uprights—wood?

A. Some kind of wood.

Q. What kind?

A. I think the bottom slat was made out of oak, it looked to me that night going up there to be oak, and the band, you know, that is iron, seems to me like that slat was oak.

Q. When did you ever see that pilot?

A. Sir?

Q. When did you ever see that pilot—now you say it was oak?

A. Saw it that night.

Q. It was pine, wasn't it?

A. From where it was splintered, I thought it was oak.

Q. Your foot was cut off.

A. Yes sir.

Q. You were suffering?

A. Yes sir.

86 Q. And you stopped to find out whether the bottom slat was made of oak or soft pine?

A. Did not have to stop, was running back up town.

Q. How did you come to go back on the cow-catcher?

A. Mr. Dase, Mr. Lancaster and Mr. Cain put me on there.

Q. You almost faint-?

A. Was not faint.

Q. Yet you remember that board to be oak?

A. I was sitting right over on the pilot like that looking at it, right down in front of me, could not help but see it.

Q. You took the time to discover what character of wood that was?

A. Did not have to take any time.

Q. Head light shining right down on that pilot, was it?

A. Well, the head light shone right out in front of the track, it did not shine right on the pilot. Very little light on the pilot.

Q. Very little light on the pilot from the head light?

A. I had a lantern there.

Q. It was from the lantern that you saw what kind of wood this was?

A. The lantern and the head light both.

Q. If you had stood back on the lower slat of the pilot this way from the edge of it you could not have been hurt?

A. How is that?

Q. If you stood back with your heel back next to the second slat you would not have been hurt, would you?

A. If I stood back? I thought I stood back about as far as I could get.

Q. Couldn't you have stood sideways?

A. I don't know about that.

Q. You had your foot two inches and a half over the edge of that pilot, didn't you?

A. Yes sir.

Q. That the shoe—you brought it here?

A. That is my shoe.

Q. You said that these toes were at least two inches and a half over the edge of that pilot?

A. Yes sir.

87 Q. You say that you felt the pilot scrapping on the rails—track there?

A. That all happened, you know, in a very short space of time. I was standing on the top of that pilot because I supposed it a safe place to ride. I supposed it was as safe there as any part of the train. I did not expect to run in that frog.

Q. Perfectly safe in the gangway?

A. Safe place as any, there is no perfectly safe place on an engine.

Q. What do you mean by that?

A. One place is as safe as another.

Q. You mean railroad business is an extra hazardous business?

A. It is usually, yes sir, everything you do is hazardous to a certain extent.

Q. More hazardous than almost anything you have ever done?

A. We never consider that much more hazardous than anything else.

Q. No more hazardous than plowing the farm or driving a wagon?

A. No sir, I never looked at it that way.

Q. Don't believe the railroad business is hazardous business?

A. Yes sir.

Q. Don't believe riding on the pilot is hazardous?

A. No, not any more than riding some place else.

Q. You testified you used the pilot because it is more convenient to your work?

A. Yes sir, the pilot is more convenient to my work, I have got to be right where I could get at my work quick.

Q. Could have gotten into the gang way of the engine?

A. Yes sir.

Q. Could have stood on the step leading to the gang way?

A. Yes sir, but would have had to run clear around the engine.

Q. That would have been but little more work, little more work to you would have been the only difference, wouldn't it?

A. Have required a little time to get down around—could not have seen the switch.

Q. You could have leaned out and seen the switch on that side?

A. Liable to get knocked off by the switch hanging out side of the engine.

88 Q. With a lantern?

A. Yes sir.

Q. The engineer could see the switch, couldn't he?

A. Yes sir.

Q. His duty — to stop and let you off when he arrived at the switch?

A. No sir, his duty to stop when I gave him the signal.

Q. If you had been any other place on the engine except on the running slat of this pilot you would not have been hurt?

A. I would not.

Q. You were not a switchman—you were not employed as switchman, were you?

A. No sir.

Q. Employed as brakeman?

A. Head brakeman.

Q. Head brakeman?

A. Yes sir.

Q. The place of the head brakeman is in the cab of the engine, at his station, isn't it?

A. You ask me that?

Q. Yes sir.

A. No sir, it is not.

Q. Where is his station?

A. His station is a place where he can do his work.

Q. You didn't do any work — the pilot of the engine?

A. Didn't do any in the cab.

Q. When the train is in motion where is your station?

A. When the train is in motion a man is on the train somewhere, wherever he has got to be to do that work. Liable to be on top of cars or somewhere on the engine.

Q. You did not know that your duty required you to be in the cab or at least within a car lengths of the engine while running?

A. How is that?

Q. You don't know that your duty required you to be in the cab or within a car length of it while the train is in motion?

A. I know my duty did not require me to be on that engine.

Q. Anywhere on the train—could you go back in the caboose?
A. Not supposed to be back in the caboose, supposed to be on the head end of the train somewhere.
89 Q. Not on the engine?
A. Wherever there is work to be done.
Q. You stated, after you were injured, that you did not know what your foot struck, didn't you?
A. I don't remember what I did state in that statement not.
Q. What you know about it now you worked out from your own theory?
A. No sir I worked out from what I saw.
Q. If you knew what kind of wood the pilot was built out of you knew as much about how you were injured then as ever afterwards?
A. No sir, because I did not stop to examine the track there thoroughly at that time.
Q. Didn't you say something about the engine scrapping?
A. Yes sir.
Q. When—when did the engine scrap-? Didn't scrap- when it backed back, did it?
A. No sir.
Q. You went right back over this same frog?
A. Not while I was on it.
Q. How did it go back?
A. He backed over this frog before I got on the engine again. Before he got down on the ground where I was lying.
Q. You waited for them to back back, didn't you?
A. I know he backed back.
Q. Before he backed back didn't the crew come over to where you were?
A. No sir, not before he backed over the frog.
Q. How many feet did he back to get over the frog?
A. Of at least 10 to 14 feet from the frog when I got on the pilot of the engine.
Q. Back of it?
A. Back towards Gallup, East of it.
Q. You watched the engine back over that frog?
A. I saw it back over the frog, I did not watch it.
Q. I am asking you a question, you watched the engine back over that frog?
A. No sir.
Q. What became of the shoe.
A. When I was injured, I left it at the Page House.
90 Q. What became of the shoe that night when you were injured, stay on your foot or cut off?
A. Stayed on my foot until it was cut off.
Q. How did your toes come to be left on the track?
A. I don't know.
Q. Here is the shoe, now tell us.
A. I don't know, I told you.
Q. Every toe you had was left there, wasn't it?
A. Left where?

Q. On the track.
A. Where?
Q. On the track?
A. Yes sir.
Q. Then some sharp instrument—some very sharp instrument cut them off?
A. The pilot and the wing of the frog cut them off, pinched them off.
Q. Getting between the two pinched them off?
A. Yes sir.
Q. Can you tell how they got out of the shoe?
A. No sir, they got out of there in some manner, I don't know how they got out.
Q. Who then buried them?
A. Beddow, so some of the other boys said, I don't remember just — they were—Howard and some of them. I was not there at the time, I don't know who picked them up.
Q. In order to let the jury see the extent of your injury, let them see your foot.
A. Take off the sock?
Q. Anything in there besides your foot?
A. No sir.
Q. Then it is not true that your foot was cut off at the instep?
A. In the joint here.
Q. The ball of your foot is there?
A. No sir, my foot is cut about here, right in there.
Q. That is the ball of your foot?
A. The biggest part of the ball of the foot is cut off.
Q. From the foot?
A. From the foot.
91 Q. That would be the toe joint there?
A. Yes sir.
Q. That is right back of your big toe?
A. Yes sir, the metatarsus bone.
Q. The next joint would have been the toe joint?
A. Yes sir.
Q. That is true, isn't it?
A. Yes sir, little of it gone besides that.
Q. You made a statement on May 1st, 1905, about this accident?
A. I don't remember when it was.
Q. You made a statement?
A. I told the claim agent a lot of stuff there one day, and I told him my theory of the accident, as near as I could remember, or as near as I knew at that time.
Q. You remember you told him the truth, did you not?
A. I was telling him about the accident which occurred then.
Q. You sign any paper?
A. I believe I did.
Q. If you signed a paper was it true?
A. That is all I knew about it at the time what I told him. I don't know what he put in there.

Q. You signed it?

—. ——.

A. You did not sign a false paper?

A. What I told him was true.

Q. Isn't it a fact you are mistaken about making any statement to any claim agent on May the 1st?

A. I don't know what day it was when I made the statement to the claim agent, I don't remember.

Q. Did you make a statement to Doctor —— on May the 1st?

A. Let's see—on May the 1st—yes, I believe I did.

Q. On May the 1st there was not any claim agent with you was there?

A. No, that was along about the 1st of June.

Q. I am not talking about the 1st statement. No claim agent — present when you made the 1st statement?

A. No sir.

Q. You made it to whom?

A. Some of the hospital attendants came in there and asked me about it.

92 Q. Doctor Carter asked you about it, didn't he?

A. No, it was not Doctor Carter.

Q. Who was it?

A. One of the hospital attendants there. I don't know who he was.

Q. That the statement?

A. Yes sir, that is the statement.

Q. Al- right, is it?

A. Al- right.

Q. Then you made it?

A. I told them that—I told them the way I was injured.

Q. That your signature?

A. I guess so.

Q. Well, is it or not?

A. I think so.

Q. Now this statement was made on May 1st, 1905?

A. I don't think that fellow asked me for a statement until I had been in there two days.

Q. Well, the 30th of April—May the 1st?

A. Might have been the 1st.

Q. Anyway it was a day or two wasn't it?

A. Yes, somewhere along in there.

Q. Now, that was your impression about the matter at that time?

A. Yes sir.

Q. Whatever different impression you may have gotten about it you have gotton since this suit has been instituted, that right?

A. Not necessarily.

Q. Whatever different impression from what you may have had there what you told there, if there is any difference, it is for the purpose of this suit?

A. Not necessarily.

Q. You say here when asked the question: "In your opinion was there any defect in the track, cars, engine, pilot,——

COUNSEL FOR PLAINTIFF: You read that Mr. Sowers?

A. I don't know, I signed my name there.

COUNSEL FOR PLAINTIFF: Was that read over to you?

A. He asked me some questions, I don't remember what the questions were, I don't remember what the answers were; that first part of it there, I know that was about the way I was injured.

93 Q. "In your opinion was there any defect in the track, cars, pilot or other appliances at the place where you worked or any negligence on the part of the company or anyone in this company's employ tending to cause the accident, if so, state what it was and give the reasons? Answer: "In my opinion the track was defective, or some foreign object — on the track, causing the lower part of the pilot on which I was standing to be broken." Now, it was your impression and opinion within a day or two after this injury that it might have been either a defect of the track or some foreign object on the track? That not so?

A. I think I told that fellow at that time——

Q. Here is what you say—here is what you say about it.

A. There was some obstruction in the track there that struck that pilot, I cannot tell what that fellow put down.

Q. You told him it might have been a foreign objection—block of wood?

A. I did not say foreign object at all.

Q. You say this is your signature?

A. I think that is my signature, yes sir.

Q. You knew what this paper contained, didn't you, when you signed it?

A. I did not read it.

Q. You just now said it was al- right.

A. That fore part of it was al- right.

Q. There was no objection to your reading it over was there?

A. I don't know, that might have been put in there after I signed it up, for all I know.

Q. You did not see that done?

A. No sir.

Q. You do not charge anybody with doing anything like that?

A. No sir, I don't.

Q. Now you — "some foreign object on the track" what do you mean by that?

A. Just what I told you a minute ago.

Q. That there might have been a foreign object on the track?

A. Yes, that there was some obstruction there.

Q. Foreign object would not be part of the track, would it?

A. I told you some obstruction there, or the track was defective, what I knew at that time.

94 Q. I am speaking about what you know at this time. Foreign object on the track would not be part of the track would it. The wing of the track a foreign object?

A. Appliance right there with the track.

Q. Appliance right there with the track. Inseparable from the track isn't it?

A. Yes sir.
Q. How long — you lived in the Territory of New Mexico?
A. I don't know al- together how long I have lived there, I lived at Albuquerque—just about four years and a half, or five years, since I came down here, I guess.
Q. Where did you come from?
A. Tacoma, Washington.
Q. Born there?
A. No sir, I was born in the State of Indiana.
Q. What year did you go out to Tacoma?
A. Went out there when I was quite young, along in '87, I think.
Q. What did you do when you first went out there?
A. Went to school.
Q. Until what age?
A. Until I was about 14.
Q. Then went to work?
A. Yes sir.
Q. What work did you follow until you was 20, when you went to the railroad?
A. Done everything, worked in the shop,——
Q. You making a living all the time?
A. Yes, was able to make a living all the time.
Q. How long you live at Gallup?
A. I been at Gallup twice now, been there two different times.
Q. Parents live in Gallup, don't they?
A. My father did live there for sometime, he moved away from there now.
Q. What is your home?
A. I have not got any more home than I got right here, that is, at Winslow, now, that is where I make my home now.
Q. Where have you worked most, Winslow or Gallup?
A. Winslow.
Q. Arizona?
95 A. Yes sir.
Q. When did you first go to Winslow?
A. I went to Winslow in February, I went down there to see about going to work.
Q. Then you went to work for the Santa Fe?
A. Yes sir.
Q. Out of Winslow?
A. Yes sir.
Q. Where did you come from?
A. From Gallup.
Q. Working at Gallup at that time in a saloon, were you not?
A. I had previous to that, yes sir.
Q. At Albuquerque just before that in a saloon?
A. Yes sir.
Q. In saloon work you were able to get about three dollars a day were you not?
A. Yes sir, I got three dollars a day in some places, some places not that much.

Q. What is three dollars a day?
A. Three dollars.
Q. Three dollars a day is ninety dollars a month.
A. Yes sir.
Q. Able to make ninety dollars a month now, ain't you?
A. Not in that kind of business.
Q. Your ability to get that kind of work is now as good as ever?
A. No sir.
Q. Were you not making as much in the saloon business as with the railroad?
A. No sir, I never followed the saloon business and bar tending very long at a time.
Q. You did follow it before you went to work for this defendant?
A. I did work in a saloon, yes sir, did not make a profession out of it.
Q. Was not the last work you did before going to work for this defendant in a saloon?
A. I believe it was.
Q. Now—you are getting three dollars a day out of that?
A. Seventy five dollars a month.
96 Q. That your profession, business or trade for a time?
A. No sir, I did not have any profession, I was working,——
Q. To get something to do. Worked for the railroad to get something to do?
A. When I went to work for the railroad I made up my mind right there I was going to stay. I wanted to be a railroad man always, had wanted to be one, I considered I was better in that than anything else.
Q. You felt as if you wanted to work for a railroad—you were out of service as much as you were in the service, isn't that so?
A. Al- right.
Q. You did not go to work for the railroad and stay right with it, did you?
A. No.
Q. You ever work for the defendant before this?
A. No sir.
Q. Your first job?
A. Yes sir.
Q. You worked for them how many months before you were injured?
A. About nine or ten weeks.
Q. That as long as you ever worked for the Santa Fe Railroad?
A. As long as I ever worked for them, yes sir.
Q. Prior to that time how long had it been since you were employed by a railroad?
A. Been a year.
Q. Whole year?
A. Yes sir.
Q. Then how long previous—during that whole year where were you?
A. During that time I was laying off.

Q. When did you make any statement after the one which I have shown you?

A. I don't remember when it was, along in June.

Q. Before whom was it made?

A. Mr. —— came around to my house, my room and asked me a lot of questions and wrote them down on a paper, and asked me if I would not sign my name to it.

Q. You did it?

97 A. I did, I told him I would accommodate him to anything he wanted.

Q. It true or false?

A. I don't know what he put in there.

Q. What he wrote down true or false?

A. I don't know that.

Q. Did he read it over to you?

A. I don't remember whether he did or not, I don't believe he did.

Q. You signed it just because he said so.

A. I signed his paper there, he asked me a lot of questions, I don't — what he put in there.

Q. You did not think anything about a law suit at that time?

A. I was not figuring on any law suit at all, no sir.

Q. And it was about the 1st of June, you say, 1905?

A. Somewhere along in there. I don't think I had ever consulted a lawyer at that time.

Q. That was two months after the injury, a month after the injury?

A. Yes sir, a month after I was injured.

Q. Is there a court held at Gallup?

A. I don't know anything about that.

Q. Court held at Winslow?

A. Yes sir, courts at Winslow.

Q. What kind of courts?

A. I don't know. Never paid any attention.

Q. You did not know they had courts at Winslow to try railroad cases or any other cases like this?

A. No sir, I did not know anything about this.

Q. How did you come to find out there was a court down here?

A. Because I knew it.

Q. Knew there was a court here but did not know there was one at Gallup?

A. Suppose there are courts there.

Q. There is one at Albuquerque?

A. Yes sir.

Q. Held there regularly?

A. Yes sir.

Q. Held at Gallup?

A. Never been in the court house there, never paid any attention to it.

98 Q. Never in this court house before, were you?

A. Never was.

Q. How come you to ascertain this case could be brought down here?

A. I understood that from Mr. Patterson and Mr. Wallace here.

Q. How?

A. I understood that after we had quite a little correspondence, I don't remember just when the first correspondence was.

Q. You say there are courts in the Territory and in towns through which the coast line of the Santa Fe runs where you could have brought your suit?

A. Yes sir, courts there.

Q. Court at Winslow?

A. Yes sir.

Q. A court where you could have brought this suit?

A. Courts in Navajo County there.

Q. What is the County seat?

A. Holbrook.

Q. Court then at Holbrook?

A. Yes sir.

Q. Court at Las Cruces up here too?

A. I don't know whether Las Cruces is a county seat or not.

Q. Yes sir. You say you knew the rules of the defendant company?

A. Yes sir.

Q. It was your duty as brakeman to know what orders the conductor and engineer received was it not?

A. Yes sir, supposed to.

Q. What kind of weather was it when you were injured?

A. The weather—it had been raining a few days previous to this, and I believe it had rained a little this day.

Q. What was the condition of the country. Was not it about as wet a period as you ever had?

A. Why, it was generally wet, yes sir.

Q. Was not the main line in a soft condition?

A. Parts of it.

Q. The engine that was pulling that train, when you started out for Winslow, and went off the track, was not it because of that track?

A. It was.

99 Q. Was not it because of the excess rain fall?

A. No sir, I will not say that either. I will not say that was the cause of that engine leaving the track, where the first engine went off, that was caused by a broken rail, the rail broke right under the engine.

Q. Was not the track very soft at that place?

A. The track was soft al- right there, whether the softness of the track caused that engine to go off there I don't know because I did not examine that.

Q. Had not it been raining right along during that winter, right up through the Spring?

A. It had been raining, yes sir, been considerable rain there, yes sir.

Q. Had never seen one like it—winter like it?

A. I had not.

Q. Was not it considered by people who you heard discussing it, that it was the most unusual spell of wet weather they had ever seen?

A. It was considered to be an unusual wet season.

Q. You knew on the main line there were several soft places of track along?

A. Yes sir.

Q. You knew that the engineer had got orders to look out for soft track?

A. I had.

Q. You read those orders?

A. I saw some orders, yes sir, that read in places along.

Q. You knew that the orders covered these yards?

A. No sir, I did not see any order covering the yard.

Q. Did you see all the orders that the engineer and the conductor got?

A. Why, I was supposed to see them all, whether they showed them all to me or not I don't know.

Q. Your duty to ask for all orders, wasn't it?

A. I did not see any orders they got at Gallup—going West had not seen any of them yet.

Q. Isn't it your duty and a rule to ask or to obtain all orders?

COUNSEL FOR PLAINTIFF: The rule is the best evidence.

100 Q. He says he knows the rules.

COUNSEL FOR PLAINTIFF: If they are in writing I want the rules.

COURT: Answer the question.

Q. Was not it your duty to ask for and inquire of the conductor or the engineer——

A. Yes sir.

Q.—The instructions of all orders which he received governing the movement of your train?

A. Yes sir, when we get out of the yards, when we get out of the yards then the brakeman says give us the orders.

Q. Why not when you get on the train?

A. What do you mean?

Q. Why not inquire about the orders when you get on the engine?

A. Didn't have time.

Q. You say your engine stood there?

A. Yes sir.

Q. Near the depot office?

A. Yes sir.

Q. Your business was to be there on the engine was it not?

A. Conductor had not got his orders when we were standing there.

Q. When he came out he brought his orders with him?

A. Yes sir.

Q. You saw the orders then?

A. I saw him with a handful of orders, he said ready and I gave the signal to go right down through the yards. It was customary

when we got out of the yards to get on the engine and see what orders he had.

Q. That the way you worked it?

A. That is the rule with all railroads.

Q. Didn't you hear the engineer—the conductor read the orders over there to the crew?

A. I did not.

Q. Before you started?

A. I did not.

Q. Didn't you hear the engineer read the orders back to the conductor?

A. I did not.

Q. Where were you?

101 A. Riding on the pilot of the engine.

Q. When the conductor took the orders to the engineer, where were you?

A. On the pilot.

Q. What for?

A. For the purpose of opening these switches.

Q. The engine was standing still?

A. Yes sir.

Q. Didn't the conductor communicate the orders to the engineer?

A. Engineer had the orders in his hands.

Q. The engineer didn't read any back to the conductor?

A. Not that I know of, I was on the pilot of the engine.

12 o'clock.

Q. You say this was a passenger engine?

A. Yes sir.

Q. How many wheels have they to a truck?

A. I think they have four—two wheels on each side.

Q. This one four wheels to the truck?

A. That is, *that is,* one pair of trucks.

Q. One small wheel in front and one in back?

A. Only one I think.

Q. Four wheels?

A. Yes sir.

Q. How near are those wheels together?

A. I cannot tell you that exactly.

Q. About?

A. I don't know, I expect that far apart.

Q. Three feet?

A. Couple of feet, I expect.

Q. Two feet apart?

A. Something like that.

Q. They are in what part of the engine?

A. The front of the engine.

Q. And how near to the back end of the pilot does the front wheels come?

A. Comes right up close to it.

Q. Within a few inches?

102 A. Well, comes close to it, I don't know the distance.

Q. Well, how much would you say, Mr. Sowers?

A. I should think it came up within—about a foot of it, as near as I remember.

Q. If that point there was the front of the pilot show the jury where the wheels would come in reference to the back of the pilot,——

A. How is that?

Q. If that point there be the point of the pilot,——

A. Yes sir.

Q. Show the jury on the right hand side how near the wheel would come to the back of the pilot or the front of the pilot?

A. Well, the pilot is bigger than that, you know, a whole lot. Suppose that was the end of the pilot?

Q. Well?

A. I should say the wheels of the pony truck would be here, back in here somewhere.

Q. How long is the pilot?

A. I cannot tell you that—ranges back that far I expect from that point.

Q. From the point?

A. Yes sir.

Q. You were not standing immediately upon the point, were you?

A. No, sir.

Q. You were standing right over the rail?

A. No sir, was standing right over the frog, inside of the rail.

Q. Is not it a fact that that pilot is built like that, pointed?

A. Yes sir, in kind of diamond shape, built like that, yes sir.

Q. Like that?

A. Something similar to that, the bottom part, of course, from this point it sets back like that, you understand?

Q. Slopes?

A. Yes, sir, slopes in here this way.

Q. The end of the pilot further backward from where you stood?

A. Yes sir.

Q. From where you stood to the nearest part of the wheel how far was it?

103 A. I should judge about—let me see—about that far—just about four feet, something like that—five feet.

Q. Four or five feet from where you stood to where the wheel struck the rail?

A. I never took any measurement about that, that is my judgment, about that.

Q. I will ask you of your best knowledge of that engine, or an engine like that—you say about four feet back to where the wheels struck the rail?

A. About five feet.

Q. You had occasion to examine that frog since that time, haven't you?

A. Yes sir.
Q. Tell the jury how that frog is constructed.
A. I don't believe I can do that.
Q. Don't believe you can tell the jury how that frog is laid?
A. I will try it.
Q. Exactly?
A. Made all—one piece goes this way and another piece on the other side of same, and this frog rail on each side of that, supposed to be bolted through with bolts, you know.
Q. Was not it bolted through with bolts?
A. When I looked at it,——
Q. Was not that bolted through?
A. When I looked at it it was bolted through.
Q. Are not all frogs now bolted together with bolts?
A. I cannot say that, some are made different, you know.
Q. Was not that frog bolted with bolts since the time it was put down?
A. I don't know whether it was or not.
Q. Is not it a fact that between the frog and the rail, and between each part there is a heavy iron or thick iron so arranged as to fit in there?
A. When you go down and look that over,—the rail runs clear out,—there is cast iron in there, I know that.
Q. Cast iron?
A. Yes sir.
104 Q. Is not it wrought iron?
A. May be that, I know it is iron—heavy iron.
Q. To refresh your memory, take that picture, where was your foot caught?
A. Right here.
Q. Right on the edge of that?
A. Right on that point, right there.
Q. By that?
A. No it was caught right there.
Q. You tell the jury your foot struck that point?
A. Yes sir, I can tell them that I think my foot struck that point.
Q. That is your opinion?
A. Only place I could have been injured at, only one place at that point where I could have been injured.
Q. You — willing now to tell the jury under oath that your foot, or any part of your foot was cut by the edge of the wing of that frog?
A. Yes sir.
Q. You are willing to do that?
A. Yes sir.
Q. Why do you say that?
A. I can say that I believe to the very best of my knowledge I was right at that point, and that that cut my foot.
Q. Right at that point?
A. Yes sir.

Q. And no where else?
A. And no where else.
Q. You were standing on the lower slat which was three inches back?
A. Two and a half or three inches.
Q. Two and a half or three inches back?
A. Yes sir.
Q. That this frog and this track were on a level you said and you were two inches and — half or three inches above that frog, were you not?
A. I said there was two inches and a half to three inches above that rail.
Q. Above that rail?
A. Yes sir.
Q. If these were on a level—the frog on a level with the
105 rail—you said they were the same height? You thought the frog was on a level with the rail,——
A. You understand me?
Q. Answer the question. Doesn't this picture show,——
A. It shows it there.
Q. It shows the bolts?
A. Yes sir.
Q. Running through there?
A. Yes sir.
Q. This bolt?
A. Yes sir.
Q. Another bolt there?
A. I cannot see but one through there.
Q. Can't you see it rung through here?
A. Yes, in there.
Q. Don't you see another one through there?
A. No sir.
Q. That is not a solid piece running from here to here?
A. No sir.
Q. You certain of that?
A. From here to here?
Q. Yes sir.
A. No sir, does not.
Q. Certain of that?
A. Certain of that.
Q. Now, you will admit that this picture shows both from this wing of the frog to the opposite wing of the frog?
A. Yes sir.
Q. From there to there?
A. Yes sir.
Q. You spoke of a short piece of rail, the east rail of the frog—the junction of the frog right along that piece of rail?
A. Between five and six feet.
Q. Between five and six feet. You said something about the

track or rail being of a different kind from there to there, didn't you?

A. Yes sir.

Q. What kind?

106 A. One as a lighter steel than the other.

Q. The frog is heavier steel?

A. The frog is heavier material than where that bridge is.

Q. Yes sir. These does go through this side from the South side of the track upon which the frog is situated to the North side of the track, don't they?

A. These not the ties there were in there at the time I was injured.

Q. All switch ties run entirely through the track do they not?

A. Supposed to.

Q. Supposed to?

A. Yes sir.

Q. Which would be the length of ties under the two tracks?

A. Yes sir.

Q. Which would be one length of ties under the two tracks?

A. Yes sir.

Q. That is the customary way of building frogs?

A. All frogs?

Q. Yes sir. You mean to say it was not so when you got hurt?

A. I don't know whether it was or not.

Q. Why do you make any distinction?

A. Because I don't know.

Q. In order for the frog which struck your foot to have reached above the iron band, it must have been two and a half or three inches above the rail, would it not?

A. Had to be higher than the rail in order to have caught my foot.

Q. How much higher would it have to be, will you describe, how much higher would that frog have to be to have reached your foot standing on that iron band?

A. That is something I cannot tell you. I may have had my foot tilted just the slightest bit, you know, over the end of that, but if it was that way it would have caught my foot and throwed it underneath.

Q. Exactly, and raise the pilot?

A. It certainly would.

Q. Raise the pilot?

A. Pilot would jump over it.

107 Q. How much is that—how wide?

A. How much is what?

Q. Width of your foot?

A. Four inches, I guess, four inches and a half.

Q. To illustrate in order to let the jury understand—gentlemen if you will kindly look—now that is two and a half inches to there, was it?

A. Yes sir.

Q. Now do you call that three inches or two and a half?

A. I don't know, will let you put it?
Q. You are the man that is most interested.
A. Put it to suit yourself.
Q. Say that is two and a half inches to that point—this is the band around the pilot—you were standing on top of that iron band were you not?
A. Yes sir.
Q. Like that, your foot up on top of that, the nearest rail upon which the wheel is at least two and a half inches under this, under this, that right?
A. How is that?
Q. The nearest that the ball of the rail would be to the top of the step, or slat—band—which you stood on would — two and a half inches?
A. Probably be about six and a half or seven, I judge.
Q. What this, from the top of the step?
A. Down to the ball of there.
Q. But from the bottom of the slat on which you stood to the top of the rail how much was that?
A. Oh, about four inches.
Q. About four inches?
A. That is what it should be when everything is al- right.
Q. Then for your foot, to have gotten down there so as to hit the front of this frog, you would have to put your foot over and under about eight inches, or that frog would have to raise up about eight inches, would it not?
A. No sir, not when everything is al- right.
Q. Let's see, from the top of the ball of the rail, which is that,——
A. Yes sir.
108 Q. From the bottom of the slat on which you stood, you say is three inches, two and a half inches at least? Understand?
A. Near the track, that is al- right.
Q. You were standing about over the rail?
A. Yes sir.
Q. Well, suppose in this case, whether that is a fact or not it don't make any difference; you were right out there on the slat, the bottom of which stands like that—that right?
A. I think it stands about four inches above that.
Q. That is four inches, ain't it?
A. Pretty near.
Q. Yes, that is four inches, now like that. Then the bottom of the slat is four inches above—in good condition—the ball of the rail?
A. Yes sir.
Q. That is right?
A. Right down here.
Q. How is that?
A. Be right down there—about four inches, did you say?
Q. The bottom of the slat up there?

A. Yes sir.

Q. From my figures, gentlemen, now to there, would be the ordinary condition in case everything was as it should be. Now, you were standing on the slat, like that.

A. About that.

Q. About that?

A. Yes sir.

Q. Then you were—you were standing then as much above the rail and as much above the wing of the frog, if it was in good condition, as that pencil is above my thumb?

A. Yes sir.

Q. Then in order for your foot to strike the end of the wing of that frog, that frog must raise up that distance, which is six inches and a half, or you must go down, that pilot must go down six inches and a half, is that right?

A. Have to go down? Must go down to here, from here down to the track.

109 Q. Your foot on top mind you; for your foot to come in contact as it did with that wing of the frog, your foot, from where you stood, must clear the ball of the rail, upon which the wheels run, six and a half inches,——

A. How is that?

Q. In order for your foot to come in contact with the wing of the frog as it did, the frog must have arisen six and a half inches above the ball of the rail upon which the wheels run, or your foot moved down six and a half inches?

A. I don't know how low the ball of the rail was that the wheels runs on. That — they way it happened, and my theory of it is, my idea of it is, what I believe is,——

Q. Well, that is six and a half inches?

A. I don't know how far it was down there, far enough to allow the pilot to strike this wing of the frog.

Q. It would have had to go down six and a half inches for this to have happened?

A. I don't know how far it would have to had went to do so.

Q. How come the wheels to let the pilot down six and a half inches, is the wheel struck the pilot on the track on which the wheel runs?

A. The wheel could not let the pilot go down far enough to have the pilot or top of that slat strike the ball of the rail—that is impossible. It is the bottom of the slat that got down on the rail.

Q. Talking about the bottom of the slat, how could the sink in the track—the low joint in the track, let the pilot down, the distance between the top of the slat where you stood and the rail upon which the engine runs, without the pilot striking the ball of the rail upon which the wheels run?

A. I cannot answer that question.

Q. You are a railroad man?

A. Yes sir, but I am not a machinist.

Q. Explain it anyway you please.

A. From the bottom of the slat to the pilot.

Q. Yes sir.

A. I have already stated that the frog must have been high. The slat got down on the rail, that so far as I know.

110 Q. It could not — caught the ball of the rail?

A. I don't see how it could.

Q. Could not — have caught the ball of the rail?

A. I don't see how it could.

Q. Then when the bottom of the slat—this is the pilot right there—this represents the rail four inches below—according to your testimony,—the bottom of the slat, this is the bottom of the slat right there according to your testimony. You have testified from the wheel—your testimony is it is four inches between the bottom of the slat to the top of the rail.

A. Should be.

Q. On top of that you had a safe guard, the thickness of the slat upon which you stood?

A. Yes sir, supposed to have.

Q. And between the frog—or between the top of the rail from here, the thickness of that slat upon which you stood?

A. Yes sir.

Q. Anyway between the bottom of the slat to the top of the slat was two and a half or three inches in width, and the iron band upon which you stood?

A. Yes sir, two and a half or three inches that I stood on top of.

Q. Then the bottom of the slat could strike the rail—the wing of the frog, and you would still have two and a half or three inches space between you and the frog?

A. I don't think so. The end of the frog caught my foot in such a way that it turned it over, pulled it down a little bit, that is the best explanation of it I can give.

Q. I am trying to see the theory upon which you base your explanation. You gave the explanation, I am asking you for the theory of it?

A. I am trying to give it to you the best I can.

Q. I am asking you how you got rid of that much space; the distance between the top of the slat, which is this, and the top of the rail, which is this?

A. Ask that over again.

Q. Getting rid of all that space. *You* do you manage to get rid of that much space, four and a half to six inches?

111 A. I told you.

Q. Did it drop down that much?

A. No sir, I just told you. Here is the space here it dropped, that distance, four inches, and the frog caught my foot that way. Understand what I mean?

Q. No sir. If the wing of the frog was half an inch higher than the rail, I don't understand what you mean. Half an inch did you say was the distance between the height of the wing of the frog and the ball of the rail would not give six inches and a half would it?

A. No sir.

Q. Then you know—if there was one half inch difference between

the height of the rail and the height of the wing of the frog,——

A. I just told you that the end of the frog caught my foot below that, that is the way it happened.

Q. You mean to say that the frog came up flush with this point?

A. Up where?

Q. Up flush with the top of this point?

A. I have not said that.

Q. Do you mean to say that?

A. I have not said it yet.

Q. You mean to tell us that the wing of the frog came up and hit that place like this?

A. I mean to say that that wing of that frog — up here and hit this pilot, the rim around that pilot.

Q. How far up did it hit it?

A. I don't know where it hit it.

Q. You swear it touched it?

A. I know it did.

Q. You swear it touched it?

A. I know something hit it.

Q. If that raised up so as to strike this point of the pilot what became of the rail that the frog was bolted to?

A. I don't know.

Q. Would not it raise up too?

A. I don't know that it was bolted to a rail at that time.

Q. You brought a picture here showing it to be bolted?

A. That was taken forty days after.

112 Q. You introduced that picture as showing the conditions?

A. I introduced that to show the track.

Q. You don't mean to say that that track was not bolted at the time of your injury?

A. I don't think so.

Q. You know it was not?

A. I don't know that it was.

Q. If it had been bolted like you show in your picture, if the frog raised up would not the other part of the track raise up to- being bolted together—could one raise up without the other?

A. Yes sir.

Q. How much?

A. I don't know how much, but it could raise that other one.

Q. Bolted together?

A. Yes sir.

Q. You will swear to that?

A. To the best of my knowledge an belief it would.

Q. If they both raised up would not the pilot strike them both together?

A. If they both raised up together, yes sir.

Q. Would not it raise the pilot and keep your foot two and a half inches always above the rail?

A. How is that?

Q. If they raised up together would not they rise up together,

and likewise raise the pilot, and raising the pilot would not it keep your foot two and a half inches above any danger?

A. If they were both the same.

Q. And would raise the pilot from that?

A. Yes sir.

Q. And the slat on which you were standing?

A. I think so.

Q. Then if you had remained with your foot—this being the bottom slat—on top of that slat and not in front of it you would not have been injured?

A. I was on top of the slat when I was injured.

Q. If you had a—I asked you, if your foot was on top of that slat and not in front of it you would not have received the injury you did?

113 A. Yes, I would.

Q. You would have received it?

A. Would have got some kind of an injury because I was standing on top of the pilot.

Q. If you were on top of the pilot—now the wing of the frog struck the pilot like that—this is the pilot, and here is the frog, and you were standing right there how could that strike your foot?

A. If my foot had been here, back there and had not stuck out to the edge there, would not have injured me, no.

Q. Would it have injured you no matter where you were, if your foot was on a level with the top of that slat?

A. I don't know about that. I know the end of this caught my foot and turned it right back that way.

Q. You say this is the frog. You were standing on that, which is the pilot, two and a half or three inches thick?

A. Yes sir.

Q. You do not claim, do you, Mr. Sowers, that this frog came higher than the top of the slat on which you stood, do you?

A. No sir.

Q. The track as high as the slat on which you stood?

A. No sir.

Q. Never did get as high as the slat on which you stood?

A. No sir, I don't think it did.

Q. You were standing more in that shape or this shape, back this way?

A. Where do you mean?

Q. There is the edge of the pilot. Now if it did not get as high as the top of that, where you stood, tell the jury how your foot got down in between that wing of that frog which you say cut it and the pilot?

A. I cannot tell you that question at all.

Q. Can you tell the jury any negligence on that part of this company which cut your foot?

A. Yes sir.

Q. Tell them what it was.

A. I can tell them that it was negligence on the part of
114 the company in having the frog get above the track. Having that low joint there, so the pilot could go down on the track.

Q. The rail is on the right hand side of that frog, that is, going West?

A. Yes sir.

Q. This is a continuous rail, is it not Mr. Sowers?

A. Yes sir.

Q. That rail is continuous?

A. Yes sir.

Q. The pilot reaches out over that rail as well as the pilot going over the wing of that frog?

A. You mean it goes out over the edge of the rail?

Q. Yes sir.

A. Yes sir.

Q. It goes out over the edge of the rails. If the wheels dropped down at any place more than the distance between the bottom of the slat and the top of the rail, the pilot would immediately strike the rail, would it not?

A. Yes sir.

Q. And would tend to raise the pilot—the pilot and the slat up, would it not?

A. Ride right along on the top of the rail.

Q. Ri*ght* right along on top of the rail?

A. Yes sir.

Q. As the wheels continued to go up and the pilot would have to raise up also?

A. Yes sir.

Q. You say this was about half an inch higher than this rail?

A. Yes sir.

Q. And this is two inches and a half, this slat?

A. Yes sir.

Q. The pilot would slide along on the rails if the wheels dropped down on a low joint?

A. Yes sir.

Q. Then if it dropped down the wheels would either drop or raise up like that would it not?

A. Let me show you something if I can get around there to show you?

115 Q. Certainly.

A. Here is the pilot, running that way.

Q. I know it.

A. Here is the wheels back here.

Q. Yes sir?

A. If they continue to go down,——

Q. Yes sir.

Q. This bound to be higher back here than it is right here.

Q. Yes sir?

A. When the pilot strikes this outside rail it is much lower there because the pilot runs back this way, this much lower than it is where the rail or pilot strikes it then where it strikes this point.

Q. Yes, I understand that exactly. Now, but your pilot would stop on top of the rail where it struck it would it not?

A. Yes sir.

Q. Stay on top of the rail. On top of the continuous rail upon which the wheels run?

A. It should have, yes sir.

Q. Say it dropped down four and a half inches, understand?

A. Yes sir.

Q. You were not standing on the point of the pilot, this curve which you talk about not in the point of the pilot. It is back here on the side from the rail?

A. What curve you talking about.

Q. Where you say you stood on the outside of the rail—no, just inside of the rail?

A. Just inside of the rail, how far inside of the rail?

Q. Over the wing of that frog, you said?

A. Suppose that is the side of the rail?

Q. Yes sir?

A. Entire length of it, that curves straight in here.

Q. Where you stood?

A. I stood right in here.

Q. Right in the middle?

A. Stood right where my foot caught that frog.

Q. How do you know it was?

A. In front of my foot.

116 Q. You know from what you have found about it since?

A. I know from the circumstances, the way the accident occurred, everything.

Q. You did not know that that frog had hit your foot?

A. I knew something hit my foot right there at that frog, was not anything else there but that frog.

Q. You knew something hit it—now did you know it struck the frog?

A. Yes sir, did.

Q. You did not see it for forty days after, did you?

A. No sir.

Q. Did not know it that night, but you know it now?

A. I did not know positively of it that night.

Q. Who told you you struck the frog?

A. I know it now, nobody had to tell me.

Q. You know it now? Didn't know it at that night?

A. I knew I hit something right there at the frog, I couldn't tell whether the frog or what it was, I noticed when we went back there that there was nothing else there to hit it.

Q. Didn't you say the next day that it might have been some obstruction, some foreign body on that track?

A. I did.

Q. That as near true as anything else you know about the case?

A. I said there was an obstruction there.

Q. Some obstruction?

A. Yes sir.

Q. Some foreign obstruction?

A. I said something there the next day, some kind of obstruction.

Q. You say that now don't you, something there which struck your foot?

A. Yes sir.

Q. You will not swear it was not a foreign substance which you testified about when you made that statement?

A. I will say,——

Q. You know now, it was not some foreign object.

A. Yes sir.

Q. You say it was not a foreign object?

A. I say now it was the end of that frog.

117 Q. You said then, the next day probably it was some foreign object?

A. I did not say that at all. I said some kind of obstruction there. I said something there.

Q. Let's get your exact language. I don't want to misquote you. "In my opinion there the track was defective or some foreign object on the track."

A. That is not—you ain't quoting me there.

Q. Yes I am quoting you, you signed this paper.

A. That is al- right, I did not write that.

Q. It don't make any difference. You did not repudiate the statement, you did not attempt to repudiate the statement?

A. What do you mean?

Q. Claim you did not sign it, did not understand it?

A. I signed that paper.

Q. You understood it?

A. He asked me questions about it.

Q. You had it read over to you. You put your name to it?

A. I signed it.

Q. You said there was either a defective track or some foreign object on the track. You state that?

A. No sir.

Q. You did not say that?

A. No sir.

Q. You did not sign a paper which said that?

A. I don't think I did, I told them there might be some kind of an obstruction on the track?

—. ——.

A. Yes sir.

Q. You don't mean to tell me that a frog, part of the track, forms an obstruction upon the track? You call that an obstruction?

A. I certainly do, where it catches the pilot.

Q. You call a low joint an obstruction?

A. If it was low enough to make other obstructions there.

Q. What do you mean by "foreign object" Admit then your definition of obstruction, what do you mean by foreign object?

A. I did not put that foreign object in there.

Q. Where did you get that cane, Mr. Sowers?

A. This cane?

Q. Bought it in El Paso?
118 A. Yes sir.
Q. Come here with it?
A. Yes sir.
Q. Have not used a cane for a month?
A. Yes sir, I have.
Q. How long you used a cane?
A. Use a cane about half of the time.
Q. How long you used a cane?
A. Day or two before I came down here.
Q. Why didn't you bring it with you?
A. Came away and forgot it.
Q. You have used that cane since you came here?
A. Yes sir.
Q. Did not use it constantly before you came here. Did not need it before you came here, constantly?
A. Not all the time, did not need this all the time. I can get around part of the time without a cane, don't like to carry one if I can get along without it.
Q. Did you make any statement about this case to anybody?
A. No sir.
Q. Never at any time?
A. What do you mean, do you mean when you just talk about it?
Q. I asked you a question.
A. No sir.
Q. You made a statement under oath about this case, didn't you?
A. No sir, I did not. No, I am, I gave Mr. Hudson a notice of it.
Q. Didn't you swear to it?
A. Yes sir, if that is what you call a statement.
Q. What do you call it?
A. I don't know what you call it. That is what I thought you meant when you said that the other day. I made a statement to the claim agent.
Q. You made a sworn statement?
A. Yes sir.
Q. And filed it with the agent of the Company in New Mexico?
A. Yes sir.
Q. You admit to doing that?
A. Yes sir.
119 Q. You admit to doing that perfectly and correctly?
A. As near as I knew, yes sir, at that time.
Q. And this is the statement, isn't it attached to your petition?
A. I don't know what it is until I see it and read it.
Q. You can read this as long as you please?
A. Yes sir.
Q. Is that the truth or not?
A. That is the truth, so far as I knew at that time.
Q. At that time. Could you know any more after then than you did at that time. I will read it.
A. Yes sir, that is true.
Q. That is true is it, who wrote that out?

A. Mr. Wallace, I presume, or Mr. Patterson.

Q. Where were you when they wrote it out?

A. I don't know, up there at Winslow or Gallup, somewhere along there.

Q. When they sent it to you what did you do with it?

A. I took it over to the notary public. I read it over, saw it was correct and took it over to the notary, Mr. Kuckenbecker, had him swear me to it went up and gave it to the agent at Gallup.

Q. You say here: The engine and the pilot came in contact with a frog or some other obstruction on the track, and before I could get into a place of safety, the cow-catcher broke, threw me down and my foot was caught by the pilot?

A. No, my foot was caught by the pilot then I was thrown down.

Q. "The engine and the pilot came in contact with a frog or some other obstruction on the track, and before I could get into a place of safety the cow-catcher broke, threw me down." That is the cow-catcher threw you down. "And my foot was caught by the pilot." That correct?

A. I told you a moment ago my foot was caught.

Q. I don't care what you told me. Listen to me, is that statement correct?

A. I am telling you what is correct.

Q. I am not asking you what is correct. Is that statement correct?

A. Statement that I fell down first and then the pilot caught me?

Q. Just listen now, and answer this question, yes or no, which you can do. "The engine and the pilot came in contact with a
120 frog or some other obstruction on the track, and before I could get into a place of safety, the cow-catcher broke, threw me down and my foot was caught by the pilot of the engine."

A. No sir, I did not fall down first.

Q. Then this is not correct?

A. The part of it which states that I fell down before is not.

Q. Why did you swear to this paper?

A. That paper is true. That is substantially way it happened, couple of words in there just reversed, that is all.

Q. Just reversed?

A. Yes sir.

Q. You swear to paper that reverses itself?

A. Should not.

Q. How long you had this paper before you swore to it?

A. Couple of days I guess.

Q. You studied it over?

A. I read it over.

Q. And over again?

A. I read it over, yes sir.

Q. No Santa Fe people were asking you to sign it?

A. No sir.

Q. No employee was interested in you signing something that was not true?

A. No, nobody asked me to sign that.

Q. You went before a notary public of your own selection?

A. Yes sir.
Q. Who was he?
A. William Kuchenbecker.
Q. You had him take your affidavit and when he took it you paid him for it, and delivered it to the agent of the Company, and kept a copy of this affidavit? Or the original of it, which?
A. I delivered him the original, I believe.
Q. The original?
A. Yes sir.
Q. Look at that paper and tell me if that is the one you delivered to him?
A. I believe that is the one I delivered to him, Mr. Henderson.
Q. That is just as it was when you delivered it to him is it?
121 A. I think so, yes, I think that is the one.
Q. Now, Mr. Sowers, let's see the one that is attached to your petition,—is it a copy? Now, see if you have got—are there any interlineations in the one attached to your petition?
A. I think there are some.
Q. That was not the one you sent them, was it?
A. Yes sir.
Q. Just like that?
A. Yes sir.
Q. Then you had two acknowledged—two papers acknowledged, didn't you?
A. Yes sir, two.
Q. Both of them are originals?
A. Both papers—both the same.
Q. Both the same—both duplicates.
A. Both like the other one, I don't know whether you call them originals or not.
Q. Now, Mr. Sowers, as a matter of fact you are all wrong about how you got your foot hurt, wasn't you?
A. What do you say?
Q. As a matter of fact you are entirely mistaken as to how you got your foot hurt, are you not?
A. Was not.
Q. Your foot did not get over that three inches of thickness of the lower slat to get under it so as to strike the wing of the guard rail, did it?
A. My foot got in between the end of the wing of that guard rail and the point of that pilot.
Q. Is not it a fact you were standing on the left foot and dangling that right foot?
A. No sir.
Q. Which foot was injured?
A. The right foot.
Q. Is not it a fact you were standing like this, facing ahead of the engine, hand hold of the engine, and that foot like that?
A. No sir.
Q. How else could that foot have been caught if you were up on

top of that slat, standing like this. How could you have been
122 caught?

A. I have not told you I was standing like that.

Q. You told me you were standing on top of that slat?

A. Yes sir.

Q. You standing this way, Mr. Sowers, unless that wing of that rail got up above the two and a half inches thickness of that slat, how could that have reached your foot?

A. I was standing up like this,——

Q. Yes sir.

A. So.

Q. Yes sir.

A. And this, the end of that caught my foot and turned it right back that way?

Q. Yes sir.

A. Yes sir. That is the only explanation I can give you about it.

Q. That probably gotten from your idea since the occurrence?

A. No sir, I remember exactly how my foot was.

Q. Here is the way a brakeman rides on the pilot, if he is holding to the timber or rod, isn't it?

A. No sir, not always.

Q. Got to hold to something?

A. Don't have to hang down there.

Q. Got to hold on to something?

A. Yes sir.

Q. That piece of timber that is at the head of that engine, on the pilot, or a rod, that is screwed to it, you could hold on to that?

A. On the front of the engine?

Q. Yes sir.

A. No sir.

Q. You said then a man should reach back and get hold of a hand hold?

A. I did not say anything about a hand hold—I said I had hold of that rod there.

Q. What road?

A. The handle there.

Q. Where is it located on the pilot?

A. Located right behind me.

Q. How far back from the point of the pilot?

123 A. I don't know, the,——

Q. How many feet?

A. I cannot tell you.

Q. About how many?

A. From the end of the pilot I would say—I was right here, standing like that, and just had to reach around behind.

Q. That is two and a half feet from the point of that pilot?

A. I don't know, the point of the pilot out in front of me, I was standing over there.

Q. From the end of the pilot to that is about two and a half feet?

A. Back in here.

Q. About two and a half feet?

A. I don't know just how close.

Q. About how much.
A. I cannot swear how close.
Q. Who can?
A. Probably a car builder, the man that builds the engines, somebody that knows more about an engine than I do.
Q. You looked at that engine?
A. That is al- right.
Q. Saw how the pilot was, saw what the pilot was built out of?
A. I did not take any measurement of that engine.
Q. How far back from the point of the pilot where you stood from the wing of that frog?
A. I don't know that.
Q. How far back of you was the wheel of the engine, front wheel of the engine, on the rail?
A. I expect, I don't know how far.
Q. About how far?
A. Four or five feet, cannot tell you that because I don't know.
Q. Make a wild guess at it.
A. What is a wild guess?
Q. A wild guess is four or five feet.
A. Four or five feet.
Q. From where you were standing?
A. From where I was standing, yes sir.
Q. And when you struck, when you struck this frog with your foot, or the frog struck your foot, you say the wheel of that engine was back four or five feet.
124 A. Well, I did not make any measurement of this engine, I cannot tell you for sure how far they are. I can just guess at it, that is all I can do.
Q. This was a passenger engine with little pony trucks?
A. Yes sir.
Q. Little wheels?
A. Yes sir.
Q. The wheels right under there you say next to the back of that pilot?
A. They are pretty close there, I don't know how far.
Q. Not willing to say?
A. *For* or something like that.
Q. A foot or two, back of the pilot?
A. Yes sir, something like that.
Q. Where the pilot fastens to the engine, a foot or two?
A. As I said before, yes sir, I am not sure about that.
Q. About how far?
A. May be the length of the cane.
Q. Stick to that a minute if you will?
A. I will.
Q. Now, where did you say,——
A. I say it might be that far.
Q. May be that far?
A. From the pilot to the first wheel, yes sir.
Q. How long?

A. How long is that.

Q. 15 inches t- there—21 inches. Twenty inches. You will stick to that, will you. That is about twenty inches.

A. I won't stick to anything so far as those measurements are concerned. I told you that awhile ago. I would not stick to it so far as that is concerned, I made no measurement of that.

Q. In your judgment I am talking about. In your judgment it was about twenty inches back?

A. Yes, about that, I expect.

Q. Now, Mr. Sowers, you told me in your judgment, from the rim of the pilot back to the wheels about twenty inches—now how far was it from the heel of the pilot to where you stood on the pilot, how many inches?

125 A. I don't know. I don't know the size of one of those pilots. I don't know how big they are.

Q. Leave out the size, from the heel of the pilot,——

A. How can I answer you something I don't know.

Q. Well,——

A. About half way up the pilot. Say, we will take this for the space now, say take this 20 inches, then put half the length of the pilot,——

Q. How long was the pilot?

A. Suppose probably it was about five feet, four or five feet.

Q. Then you were two and a half feet, from the base of the pilot, were you not?

A. Yes sir.

Q. About half way?

A. Yes sir, say two feet and a half.

Q. That makes it twenty two feet and a half in your judgment from where you were here to the wheels?

A. How is that.

Q. I say twenty to twenty two and a half feet in your judgment was the distance you were from the wheels?

A. I expect so.

Q. That is about right, isn't it?

A. I cannot tell you whether that is right or not?

Q. In your best judgment that — about right—what do you say?

A. I cannot answer that question, I don't know, it is out of the question, something I don't know I cannot tell you, you know.

Q. I am asking you about your best judgment?

COURT: He says he has no judgment about it, he is just guessing at it.

Redirect examination.

Q. Now Mr. Sowers, who is Mr. W. H. Hudson?

A. N. J. Isn't it?

Q. N. J.?

A. He is the agent at Gallup.

Q. That is your signature?

A. Yes sir.

Q. Did he give you a receipt for it?

A. He did.

126 Q. What was that receipt for?

A. That receipt was for a copy of this paper here.

Q. You delivered that to Mr. Hudson?

A. Yes sir.

COUNSEL FOR PLAINTIFF: If the Court please we introduce the receipt and notice, which notice is as follows:

The Territory of New Mexico to the Atchison, Topeka & Santa Fe Railway Company, and its Officers and Agents Located in the Territory of New Mexico.

GENTLEMEN: You and each of you are hereby notified that on and prior to the 30th day of April, 1905, I was employed by the Atchison, Topeka & Santa Fe Railway Company, as a brakeman on a freight train out of Gallup, New Mexico; that on or about the 30th day of April, 1905, between midnight and daylight, a. m. I was ordered by my superiors to assist in running a light engine out of the yards of Gallup, N. Mex. We were ordered to run over track No. 5 and it became my duty, as switchman, and as one of the employés in charge of said engine to open the switches in order to get the engine off of this track on the main line and for this purpose it became necessary and a part of my duty, as well as the usual and customary practice of the brakeman, to get out and ride on the cow-catcher in order to locate the switches and throw same quickly and avoid delay. That while I was standing on the cow-catcher and keeping a careful lookout ahead the engine ran on to a soft place in the track, struck some low joints, and by reason of the defects in the track and roadbed, the engine sank down, or the track and rails sank with the engine and the pilot came in contact with a frog or some other obstruction on the track, and before I could get into a place of safety, the cow-catcher broke, threw me down and my foot was caught by the pilot of the engine and so badly mashed that it became necessary to have it amputated near the instep; that by reason of the injuries to my foot, I am now and will be the remainder of my life so maimed and crippled as to be unable to follow my profession of railroading or do any other manual labor. That the following persons, and their addresses, are all the witnesses to the happening of the facts of said accident, as near as I have been

127 at this time able to learn, to-wit: Chas. Daze Engineer, Winslow, Arizona. R. N. Lancaster, Fireman, Winslow, Arizona. Chas. Cain, Conductor, Winslow, Arizona. Robt. Howard, Gallup, N. M. Wm. Brown, Gallup, N. M. Wm. Beddow, Gallup, N. M. Pete Buckley, Gallup, N. M. F. McSparrow, Gallup, N. M. N. J. Hudson, Gallup, N. M.

"The above statement is made by me under oath and is as full and fair a statement of the nature and extent of my injury, the manner and way in which it occurred and the cause of same as nearly as I am now able to give or make.

GEORGE SOWERS.

Sworn to and subscribed by affiant, George A. Sowers, before me at my office in the town of Gallup, and Territory of New Mexico, this the 29th day of June, A. D., 1905.

[SEAL.] W. F. KUCHENBECKER,
Notary Public, McKinley County,
Territory of New Mexico."

It was further shown that the above notice was served on defendant's agent at Gallup, N. Mex. on the 29th day of June, 1905, by plaintiff in person, and that N. J. Hudson was the agent at said time for defendant at Gallup, N. M. and received said notice as its agent.

Mr. CAMPBELL, a witness for the plaintiff, being duly sworn, testified as follows:

Q. Mr. Campbell, what has been your business?
A. Locomotive engineer.
Q. What experience have you had as a locomotive engineer?
A. About 15 years.
Q. You consider yourself an experience- locomotive engineer?
A. Yes sir.
Q. Mr. Campbell, I will ask you a hypothetical question. Suppose you have a heavy engine running over a side track in front of a frog, and near the frog we have a low joint or soft track, I will ask you to state how, in your opinion, the pilot could strike either the guard rail or the wing of the frog?
A. By the front end of the engine going on to a low joint, or soft track, it naturally causes the front end of the engine to dip down.
Q. I will ask you whether or not the pilot would be on a
128 level when the pony truck strikes this low place in the track, or would it dip a little?
A. Naturally be dipped a little.
Q. What would cause it to dip?
A. The descent of the engine truck.
Q. The pony truck is to hold the engine on a level?
A. Yes sir.
Q. Well, suppose for instance that the frog is an inch higher than the rail?

COUNSEL FOR DEFENDANT: No such testimony in the case.

Q. I will ask you this question: Whether or not, if the track is properly built, the frog, or the wing of the frog should be higher or lower or on a level with the rails?
A. On a level.
Q. Now if the frog is half an inch higher than the rail, and you should strike this low joint, I will ask you to state whether or not the pilot would catch—what strike against the wing of the frog?
A. It would, provided the joint was low enough.
Q. Provided the joint was low enough.
A. Yes sir.

Q. Suppose they were level, would it strike it?
A. No sir.
Q. What I mean—suppose the frog and the rail were level and you strike a low joint, would it strike it?
A. Would strike it if the engine truck went down from the low joint.
Q. Have struck it even if the frog and rail were on the same level?
A. On the same level—unless the joint was connected on to the frog, which would make the frog go with the low joint. If it was not connected the frog would still stay on a level.
Q. What do you understand by a low joint?
A. Bare ties under the joints causes low joints.
Q. How about a soft road bed?
A. Have the same effect.
Q. The same effect?
A. Yes sir?

Cross-examination:

Q. What is your name, please, sir?
A. Martin J. Campbell.
Q. Where have you worked, Mr. Campbell?
129 A. Sir?
Q. Where have you worked on railroad?
A. I worked in New York State 13 years, then in South Carolina four years, worked in Mexico two years.
Q. How much is that?
A. That is about 17 years, I reckon.
Q. Been a railroad engineer all this time?
A. No sir.
Q. What you been?
A. I was brakeman, fireman.
Q. Mr. Campbell, if the pilot was built with slats running horizontally instead of perpendicularly, and the plaintiff was standing on the lower slat, which is two and a half or three inches difference, how could he possibly have his foot caught in between that frog and the pilot?
A. I understand you he is standing on the slat?
Q. The back of a horizontal slat, two and a half inches thick, and a band around it, standing right over the frog, the wing of the frog as he passes over the frog, how could he have been standing on that slat and have his foot come in contact with the end of the frog?
A. Pilot would have to go down pretty low in order to do it.
Q. Have to go down in order to cover the ordinary distance that it hangs above the rail, and the difference of the slat upon which he stood, would it not?
A. Yes sir.
Q. If he stood on top of it?
A. Provided the wing of the frog was on a level with the spread rail?
Q. Could a pilot drop any lower than the distance between the pilot where it hangs over the rail, to the rail?

A. No sir.

Q. Wherever it drops it would strike the pilot or some part of it, would it not?

A. The pilot would.

Q. If the plaintiff was standing over—on the pilot here, what would be the wing of the frog, how many inches would that pilot be to the side of the rail where he stood?

130 A. Well, I judge the ordinary frog, the rail would be about four inches on the outside where his foot was.

Q. In other words, his foot would be in four inches from the rail?

A. The spread rail.

Q. The spread rail. That is what the wheel runs on?

A. Yes sir.

Q. How long is an ordinary passenger pilot from the base to the point?

A. Be pretty hard matter for me to tell, there are different makes.

Q. The average one—ordinary one?

A. About two feet and a half as a general rule.

Q. Two feet and a half. How near to the base of the pilot then would the wheels of the pony truck come?

A. Back end of the pilot you mean?

Q. Back end of the pilot?

A. That is another thing that varies a great deal in different makes of engines.

Q. Here is one with four pony trucks?

A. Some almost you can hardly run your hand between them. I have seen them four or five inches between them.

Q. Between the base of the pilot and the wheel?

A. Yes sir.

Q. Then taking the ordinary passenger engine, ordinary pilot, slats running horizontally, not straight up, how far would the wheel be back of where the pilot passes over the wing of the frog?

A. Would not be over eight inches, eight or nine inches.

Q. Right or nine inches back of where the pilot passes over the frog?

A. Where his foot was?

Q. Where his foot was?

A. I calculate it to be eight or nine inches.

Q. Back to where the wheels set on the rails?

A. Yes sir, possibly more; if the wheel was right up to the base of the pilot it would not be over eight or nine inches.

Q. He stood over, he says, the wing of the guard rail?

A. That is on the other side.

Q. Wing of the frog, how far would that be on an ordinary passenger engine, of ordinary character and size, from where the

131 wheel runs on the ball of the rail?

A. I think about nine inches.

Q. If you have an extraordinary low joint it would let a pilot three or four inches high drag on the rails, wouldn't it?

A. Yes sir.

Q. If there was an extraordinary low joint?
A. Yes sir.
Q. And would be the thickness of the rail itself, wouldn't it—the thickness of the height of the rail?
A. That would depend upon how high they carry the pilot.
Q. How high do they usually carry the pilot?
A. Some roads carry pilots three inches, some three and a half.
Q. Then if this pilot should drop down and strike either the wing of the frog or strike the ball of the rail, of the track, there would have to be a dip?
A. Yes sir.
Q. In that track of that much?
A. Yes sir.
Q. How far back then from the wing of that frog would that dip have to be?
A. Where his foot was have to be nine inches back.

Plaintiff introduces the depositions of WILLIAM BEDDOW, which are as follows:

Q. What is your name, occupation and place of residence? Also please state what you were doing and by whom employed, if anyone, on the 29th and 30th days of April and 1st day of May, 1905, and where were you located?
A. My name is William Beddow, my occupation is switchman. I reside at Gallup, New Mexico. I was employed as switchman by the Atchison, Topeka and Santa Fe Railway Company at Gallup, New Mexico, on and prior to May 1st, 1905.
Q. Please state whether or not you are acquainted with plaintiff, George A. Sowers, and if so, how long have you known him, where he is now living and what, if you know, was he doing, by whom employed, if anyone on and prior to the 30th day of April, 1905, and where was he at that time?
A. Yes, I am acquainted with George A. Sowers, and have known him for three or four years. He now resides at Winslow,
132 Arizona. On the 30th day of April, 1905, he was at Gallup, New Mexico, employed by the Atchison, Topeka & Santa Fe Railway Company, as Brakeman on a freight train.
Q. This is a suit brought by plaintiff against the Atchison, Topeka & Santa Fe Railway Company for damages for personal injuries. Plaintiff alleges that on the 30th day of April, 1905, he was riding on the pilot of an engine through the yards at Gallup, New Mexico; that this engine was being operated over what is known as track No. 5; that while he was riding on the pilot the engine struck a soft place in the track or a low joint and the cow-catcher came in contact with a frog or guard rail, the pilot broke and he was caught by the wheels of the engine and had one of his feet badly injured. Please state whether or not of your own knowledge, plaintiff met with an accident at the time and place above mentioned. If you answer that he did, then please state where you were at this time and what you were doing. Also please state whether or not you were present and witnessed this accident. If you answer that you were present

at Gallup and did not witness the accident, then please state whether or not you know the exact spot where this accident occurred, and if you answer that you did, then please — whether or not you visited the scene of the accident at the time or at any time immediately thereafter?

A. Yes, I know that he met with an accident at the time and place above mentioned. It was about one o'clock, A. M. I was at the East end of No. 5 track and threw east switch to let his engine in on No. 5 track, and started down No. 5 track to head in a train, as soon as his engine would leave, and I just got down the track a little piece, when his engine came back with Sowers on the pilot and he had been injured. I did not witness the accident. I know the exact spot where the accident occurred and was at the place where it occurred about ten or fifteen minutes after it occurred.

Q. If you have answered to the above interrogatory that plaintiff met with an accident in the yards at Gallup, New Mexico, and you know and are acquainted with the place where said accident occurred and that you visited the scene of this accident, then please state as near as you can the exact location or place in the yards at Gallup, where the accident occurred and how soon after the accident to plaintiff you visited the scene of the accident. If you have answered that you visited the scene of this accident, then please state whether
133 or not you made a careful examination or inspection of the scene of the accident, and if so state fully all you saw at this time?

A. The accident occurred at the West switch of No. 5 track at the frog. No. 5 track is in the West part of the Gallup Switch yards. I visited the place of accident about ten or fifteen minutes immediately thereafter. I didn't make a very close examination of it, but I did not see any blocks of wood or anything on the track. I saw the plaintiff's toes lying on the ground at the end of the frog near the rail. There was blood on the rail of the frog, I noticed that end of the frog had been struck and dented by something. It had been raining previously to this time and there was considerable water near the frog and all over the yards and the track was very soft.

Q. If you have answered to the above interrogatory that you visited the place where plaintiff met with his accident soon after it occurred, then please state whether or not you examined or inspected the rails, ties, road-bed, track, switch, frog and guard-rail at and adjacent to where said accident occurred. If you answer that you did see, examine and inspect the track, ties, road-bed, rails, switch, frog and guard-rail at this time, then please state fully as nearly as you can: Whether or not you discovered any evidence or evidences of the accident or injury to plaintiff, and if you say you did, please state fully what evidence or evidences you saw of this accident?

A. The only inspection I made was when I went down to see if I could find the man's toes with the intention of burying them, but I had known for sometime that there was a very low joint next to this frog. I saw the plaintiff's bleeding foot and found his toes along side the rail and saw blood on the wing rail of the frog.

Q. Please state fully the condition of the joints in the rails, with

reference to whether or not they were even or uneven, high or low, in or out of alignment and the cause or causes of this?

A. The roadbed of track No. 5 is ballasted with soft engine cinders and level so far as I know, with the exception of this one low joint, and was soft owing to the recent rains.

Q. State fully the condition of the frog or guard-rail, with
134 reference to whether or not it was spiked to the ties, high or low, in position or out of position, also whether or not you saw or noticed any evidence or evidences of the frog having been struck or hit by any foreign object, and if so, what was this and what was the effect if any, on the frog. Also state whether or not you could tell whether this was an old or a new mark, if you found a mark on the frog?

A. The frog was spiked to the ties and so far as I know was all right. I saw evidence of the frog having been hit by some foreign object, as the end of the rail was battered up. So far as I know it had no effect on the frog. It seemed to be a new mark as it was bright; had it been an old mark it would have been rusty.

Q. State fully the condition of the ties and rails with reference to whether or not they were laid or maintained on soft or hard roadbed. If you answer that the ties and rails were laid on soft roadbed, then please describe said roadbed fully and state what you mean by soft roadbed; also state whether or not you saw any evidence or evidences of this track having been used to run engines or trains over immediately prior to the time of your examination. If you say you did, what evidence or evidences did you discover, which indicated that an engine or train had been run over its track recently and what effect, if any, did this have on the ties and rails, if you know?

A. The ties and rails are laid and maintained on soft cinders. I mean by soft roadbed that the bed was composed of engine cinders while the roadbed of the main line is made of volcanic cinders which are hard. There had been no engine or cars over that track that night so far as I know, but that track is used for switching purposes the same as the rest of the tracks. I found no evidence of any engine or trains having run over this track that night except the one on which the accident occurred.

Q. Please state fully the condition of the roadbed under the ties and rails adjacent to the frog with reference to whether or not the dirt was tamped under the ends of the ties or whether or not the dirt under the ties was hard or soft and if you answer that the dirt was soft under the ties, then please state, if you know, the cause or causes of this dirt being soft and the extent of the softness?

135 A. The dirt or cinders could not have been tamped very hard or there could have been no low joint. The dirt or cinders under the ties at this joint was very wet and soft. The cause of the softness was the recent heavy rains. It was sufficiently soft to cause a low joint.

Q. Please state fully the condition of the track at this place with reference to whether or not there was any block of wood, iron or any other obstruction on or near the track at or near this place between

the rails and the frog, or the rail and the guard-rail and if you say you saw this block of wood, iron or other substance, how large was it and where was it located?

A. I did not see any block of wood, or iron or any other obstruction at or near this place, on or near the track, between the rails or the frog, or the rail and guard rail.

Q. Please state fully the condition of the rails at and adjacent to this frog with reference to whether or not they are of the same size and class or a different size or class. If you answer that the rails were of different sizes, state what this difference consisted of, if you know?

A. The rails are not of the same size at this point, the rail off from the frog is heavier than the rails of the track. There is considerable difference in the weight and width of these rails, probably one-quarter to one half an inch in the width of the ball of the rail at this joint where they are joined together.

Q. Also please state whether or not you noticed any evidence or evidences of the track having been mashed down? If so, what was this and describe the same fully as nearly as you can.

A. I saw evidence of the track having been mashed down at this place. The evidence I saw was the low joint and mud and water being splashed on the side of the rails.

Q. If you have answered to the above interrogatories that you have visited the scene of this accident and have stated fully the condition of the ties, track, roadbed and frog, then please state whether or not you ever had occasion to pass over, examine or inspect this track at any time prior to the 30th day of April, 1905. If you say you did, please state fully the condition of this track, ties, roadbed and rails at the time or times that you may have had occasion to pass over same or examine it and how long was this prior to the
136 accident of plaintiff if you know?

A. I had passed over the track prior to the 30th day of April, 1905, a good many times. I had notice- this low joint for at least two weeks before this accident happened.

Q. If you have answered to the above interrogatory that when you examined this track and roadbed, the roadbed was wet or soft, then please state whether or not there was near by any sluice or culvert where the surface water which fell on and adjacent to this track was drained off?

A. There is no sluice but there is a culvert about 125 yards West of where the accident occurred where surface water is drained off.

Q. Please state whether or not you are now or was ever employed by the defendant, the Atchison, Topeka & Santa Fe Railway Company in the train service. If you were, what capacity or capacities were you employed in, over what part of the road did you run and where did you work? Also please state whether or not you are familiar with or know the rules and regulations of the said defendant company and know and are familiar with the usual and customary manner and way in which freight brakemen and other freight employees do and perform their work, when switching cars, picking up cars or opening or closing switches in the yards and at different

stations on the line of defendant's railway between Albuquerque, New Mexico, and Winslow, Arizona?

COUNSEL FOR DEFENDANT: I believe the Court has passed on that point before, but we do not agree with the court. We make the following objection: That it is no custom unless it is shown that the custom was carried to the management of the road, and then it is not binding upon the company, would be no evidence in this case, be immaterial, and irrelevant even if it was carried to the officials.

COURT: Overrule the objection.

COUNSEL FOR DEFENDANT: We except.

A. I am now employed by the Atchison, Topeka & Santa Fe Railway Company as switchman in the Gallup yards and have been so employed since 2nd day of January, 1905, but have never been in the train or road service. Yes, I am familiar with and know the rules and regulations of the Atchison, Topeka & Santa Fe Railway
137 Company. I am also familiar with and know the usual and customary manner and way in which brakemen and other employees do and perform their duties when switching in the yards and at different stations on the line between Albuquerque and Winslow.

Q. If you answer that you are familiar with the rules and regulations of said defendant company and the usual and customary manner and way in which brakemen on freight trains and other freight employees do their work, then please state, if you know whether or not on and prior to the 30th day of April, 1905, there was any rule or regulation promulgated by the defendant which prohibited freight brakemen from riding on the cow-catcher or pilot while working in the yard at such time, when it became necessary to ride on the engine to another part of the yard, in order to open and close the switch?

COUNSEL FOR DEFENDANT: We make the same objection.

COURT: Overrule the objection.

COUNSEL FOR DEFENDANT: We except.

A. There was no rule prior to April 30th, 1905, which prohibited brakemen of freight trains from riding on the pilot while doing their work in the yards and at stations, or when it became necessary to go to some other point of the yards to open or close a switch.

Q. Also please state, if you know, whether or not on and prior to the 30th day of April, 1905, it was the usual and customary practice for the conductor and brakemen to ride the engine to any part of the yard to throw a switch, for such employee to ride on the pilot of the engine. If you say that it was customary for the conductor and brakeman to ride on the pilot of the engine in the yards, then how long, to your knowledge, has this been the usual and customary practice of said employees?

COUNSEL FOR DEFENDANT: We object to same for the same reasons; all of the reasons we urge to the eight- and the ninth. This is the culmination of the eighth.

COURT: I will overrule the objection.

COUNSEL FOR DEFENDANT: We except to the ruling of the court

for admitting any custom of this kind for the reasons stated, and because there was no attempt made to show that that custom
138 was ever known by any management or the road or anyone in authority.

A. Yes, I know that on and prior the 30th day of April, 1905, it was the usual and customary practice for all brakemen, conductor and other employees of freight trains employed by defendant, both east and west of Gallup to ride the engine pilot, when working in the yards and at different stations on the line. This had been the custom on this road ever since I have been in its employ to my own personal knowledge.

COUNSEL FOR PLAINTIFF: We introduce the first part of Number 10 to show that the railroad company, if they did not know, could have known by the use of ordinary care by keeping a lookout, that the condition existed, and we introduce it for no other purpose.

COUNSEL FOR DEFENDANT: It does not say at what station or on what road. We make the further objection it is not shown that it is this railroad or that any manager or superintendent of this road was present or had knowledge of the fact that the employees rode in a place of danger, as well as for all the other reasons heretofore stated to the objection of the eight- and ninth.

COURT: I will overrule the objection.

COUNSEL FOR DEFENDANT: We except.

Q. (10th, first part.) Please state whether or not you ever saw a freight brakeman or a freight conductor riding on the pilot of the engine, when said engine was being run slowly through the yards or over the switches, if so, how often have you seen this, and at what places as nearly as you can now remember?

A. Yes, I have often seen freight brakemen and conductors ride on the pilot when working and switching in the different yards and stations.

The plaintiff introduces the depositions of ROBERT HOWARD, which are as follows:—

Q. What is your name, occupation and place of residence? Also please state what you were doing and by whom employed, if
139 anyone, on the 29th and 30th days of April, and 1st day of May, 1905, and where were you located?

A. My name is Robert Howard, my occupation is a railroad brakeman. I reside in Albuquerque, New Mexico. I was employed as a switchman by the Atchison, Topeka and Santa Fe Railway Company in Gallup, New Mexico, on April 29th, and 30th and May 1st, 1905, in the Gallup yards and resided in Gallup, New Mexico.

Q. Please state whether or not you are acquainted with plaintiff, George A. Sowers, and if so, how long have you known him, where is he now living and what, if you know, was he doing, by whom employed, if any one on and prior to the 30th day of April, 1905, and where was he at that time?

A. Yes, I am acquainted with George A. Sowers, and had known

him for about six months at the time of the accident. He is now living in Winslow, Arizona. He was employed by the Atchison, Topeka and Santa Fe Railway Company as freight brakeman prior and up to the 30th day of April, 1905. He was in Gallup, New Mexico, at that time.

Q. This is a suit by plaintiff, against the Atchison, Topeka and Santa Fe Railway Company for damages for personal injuries. Plaintiff alleges that on the 30th day of April, 1905, he was riding on the pilot of an engine through the yards at Gallup, New Mexico; that this engine was being operated over what is known as track No. 5; that while he was riding on the pilot the engine struck a soft place in the track or a low joint and the cow-catcher came in contact with a frog or guard-rail the pilot broke and he was caught by the wheels of the engine and had one of his feet badly injured. Please state whether or not of your own knowledge, plaintiff met with an accident at the time and place above mentioned. If you answer that he did, then please state where you were at this time and what you were doing. Also please state whether or not you were present and witnessed this accident. If you answer that you were present at Gallup and did not witness the accident, then please state whether or not you knew the exact spot where this accident occurred, and if you answer that you did then please state whether or not you visited the scene of the accident at the time or at any time immediately thereafter.

A. Yes, I know that he met with an accident at that time
140 at the place before mentioned. I was at home in bed at the time of the accident. I did not witness the accident. Yes, I know the exact spot where the accident occurred. I visited the place of the accident about seven o'clock the next morning.

Q. If you have answered to the above interrogatory that plaintiff met with an accident in the yards at Gallup, New Mexico, and you know and are acquainted with the place where said accident occurred, and that you visited the scene of this accident, then please state as near as you can the exact location or place in the yards at Gallup where the accident occurred and how soon after the accident to plaintiff you visited the scene of the accident. If you have answered that you visited the scene of this accident then please state whether or not you made a careful examination or inspection of the scene of the accident, and if so state fully all you saw at this time.

A. It was at the west end of No. 5 track in the yards at Gallup, New Mexico. I visited the place of the accident about seven o'clock the next morning. I made a careful examination of the scene of the accident I saw blood on the frog where his foot was caught and saw his toes there and picked them up and buried them.

Q. If you have answered to the above interrogatory that you visited the place where plaintiff met with his accident soon after it occurred, then please state whether or not you examined or inspected the rails, ties, road-bed, track, switch, frog and guardrail at and adjacent to where said accident occurred. If you answer that you did see, examine and inspect the track, ties, roadbed, rails, switch,

frog and guard-rail at this time, then please state fully as nearly as you can, whether or not you discovered any evidence or evidences of the accident or injury to plaintiff, and if you say you did, please state fully what evidence or evidences you saw of this accident?

A. I just noticed the blood on the frog and the low joint that was there. The only evidence I noticed was the blood on the frog and his toes lying there.

Q. Please state fully, the condition of the track and roadbed as to whether or not it was surfaced or unsurfaced, rough or level, soft or hard?

A. The track and roadbed was soft and pretty rough at this joint. The roadbed had been surfaced with cinders.

Q. Please state fully the condition of the joints in the
141 rails, with reference to whether or not they were even or uneven, high or low, in or out of alignment and the cause or causes of this?

A. I could not say whether they were even or uneven, high or low, but I know there was a low joint at this place, probably caused by rains and wet weather.

Q. State fully the condition of the frog or guard-rail, with reference to whether or not it was spiked to the ties, high or low, in position or out of position, also, whether or not you saw or noticed any evidence or evidences of the frog having been struck or hit by any foreign object, and if so, what was this and what was the effect, if any, on the frog. Also state whether or not you could tell whether this was an old or a new mark, if you found a mark on the frog?

A. The frog looked to be in position and all right. Could not say whether the frog was spiked to the ties or not. I did not notice any evidence of its having been hit with any foreign object only where his foot had struck and the frog looked like something had been drug over it as it was scraped.

Q. State fully the condition of the ties anad rails with reference to whether or not they were laid or maintained on soft or hard roadbed. If you answer that the thes and rails were laid on soft road-bed, then please describe said roadbed fully and state what you mean by a soft roadbed; also state whether or not you saw any evidence or evidences of this track having been used to run engines or trains over immediately prior to the time of your examination. If you say you did, what evidence or evidences did you discover, which indicated that an engine or train had been run over its track recently and what effect, if any, did this have on the ties and rails, do you know?

A. The ties and rails were laid and maintained on a soft roadbed. I mean by a soft road bed that it had rained and there was mud and water at this point. I don't remember of any engine or cars having passed over this track even the day previous. I did not discover any evidence of a train having run over this track recently so could not say what effect this would have on the ties and rails.

Q. Please state fully the condition of the roadbed under the ties and rails adjacent to the frog with reference to whether or not the

dirt was tamped under the end of the ties or whether or not
142 the dirt under the ties was hard or soft and if you answer that the dirt was soft under the ties, then please state, if you know, the cause or causes of this dirt being soft and the extent of the softness?

A. The dirt or cinders under the ties at this point was very soft. I could not say as to the extent of the softness but it was caused by the wet weather and was sufficient to cause a low joint.

Q. Please state fully the condition of the track at this place with reference to whether or not there was any block of wood, iron or any other obstruction on or near the track at or near this place and frog, or the rail and the guard rail and if you say you saw this block of wood, iron or other substance, how large was it and where was it located?

A. I did not notice any block of wood, iron or other obstruction on or near the track, at or near the place, between the rails and the frog or the rail and the guard rail.

Q. Please state fully the condition of the rails at and adjacent to this frog with reference to whether or not they were of the same size and class or a different size or class. If you answer that the rails were of different sizes, state what this difference consisted of, if you know?

A. I did not notice whether the frog and the rails were of the same size or class or not.

Q. Also please state whether or not you noticed any evidence or evidences of the track having been mashed down. If so, what was this and describe the same fully as nearly as you can?

A. I noticed mud and moisture on the sides of the ties where it had been splashed up at this low joint.

Q. If you have answered to the above interrogatories that you have visited the scene of this accident and have stated fully the condition of the ties, track, roadbed and frog, then please state whether or not you ever had occasion to pass over, examine or inspect this track at any time prior to the 30th day of April, 1905. If you say you did please state fully the condition of this track, roadbed and rails at the time or times that you may have had occasion to pass over same or examine it and how long was this prior to the accident of plaintiff, if you know?

A. I had passed over this track a good many times prior to the 30th day of April, 1905, but never had occasion to examine the track, roadbed or frog. I do not remember the dates when I
143 passed over this track.

Q. If you have answered to the above interrogatory that when you examined this track and road-bed, the road-bed was wet or soft, then please state whether or not there was near by any sluice or culvert where the surface water which fell on and adjacent to this track was drained off?

A. There was no sluice but there was a culvert about 130 yards west of where the accident occurred where the surface water is drained off from the tracks.

Q. Please state whether or not you are now or was ever employed

by the defendant, the Atchison, Topeka & Santa Fa Railway Company, in the train service. If you were, what capacity or capacities were you employed in, over what part of the road did you run, and where did you work? Also please state whether or not you are familiar with or know the rules and regulations of the said defendant company and know and are familiar with the usual and customary manner and way in which freight brakemen and other freight employees do and perform their work, when switching cars, picking up cars or opening or closing switches in the yards and at different stations on the line of defendant's railway between Albuquerque, New Mexico, and Winslow, Arizona?

COUNSEL FOR DEFENDANT: The defendant makes the same objections to the testimony, from the eighth interrogatory and on of this witness that it made to the testimony of William Beddow, whose testimony has just been read, and it is agreed that the same objections are now re-stated, as to this testimony as was stated when the testimony of William Beddow was admitted in evidence and the Court having admitted it, the defendant excepts.

A. I am now employed by the Atchison, Topeka & Santa Fe Railway Company in the train service as freight brakeman. I am working between Gallup and Albuquerque. I am familiar with and know the rules and regulations of the Atchison, Topeka and Santa Fe Railway Company and know the usual custom in which freight brakemen and other employees of the Company do their work when switching cars or opening and closing switches in the yards and at the different stations between Albuquerque and Winslow.

Q. If you answer that you are familiar with the rules and regulations of said defendant company and the usual and cus-
144 tomary manner and way in which brakemen on freight tarins and other freight employees do their work, then please state, if you know, whether or not on and prior to the 30th day of April, 1905, there was any rule or regulation promulgated by the defendant which prohibited freight brakemen from riding on the cow-catcher or pilot while working in the yards at such time, when it became necessary to ride on the engine to another part of the yard, in order to open and close the switch?

A. I know it was customary for the brakemen and other employees to ride the pilot of the engine when they are going from one part of the yards to another in order to open and close switches, but do not know of any rule or regulation of the company to prohibit them from so doing.

Q. Please state whether or not you ever saw a freight brakeman or a freight conductor riding on the pilot of the engine, when said engine was being run slowly through the yards or over the switches, if so, how often have you seen this and at what place or places as nearly as you can now remember. Also please state, if you know whether or not on and prior to the 30th day of April, 1905, it was the usual and customary practice for the conductor and brakeman to ride the engine to any part of the yard to throw a switch, for such employé to ride on the pilot of the engine. If you say that it was

customary for the conductor and brakeman to ride on the pilot of the engine in the yards, then how long, to your knowledge has this been the usual and customary practice of said employees?

A. I have often seen freight brakemen and other employees of the company riding on the pilot of the engine through the yards and over the switches but cannot give the dates. I have seen this in every place I ever worked. I know it was customary for the brakeman and conductors of freight trains to ride on the pilot of the engine to any part of the yards to open and close a switch. It has been customary for them to so ride for the last fifteen years to my own personal knowledge.

COUNSEL FOR DEFENDANT: These depositions were filed in this Court on the 26th day of August, 1905. Two terms of Court have elapsed and no written objections are filed.

145 Plaintiff introduces the depositions of CHARGES DAZE, which are as follows:

Q. What is your name, occupation and place of residence. Also please state whether or not you know the plaintiff, George A. Sowers, and if so, how long have you known him?

A. My name is Charles Daze, occupation locomotive engineer, and I reside at Winslow, Arizona, I know the plaintiff, George A. Sowers. Have known him since the first of the year or about that time.

Q. This is a suit brought by plaintiff against the defendant for damages for personal injuries. Plaintiff alleges that on or about the 30th day of April, 1905, while he was riding on a pilot of said engine through the yards at Gallup, New Mexico, the pilot struck a frog, guard rail, or some other obstruction and he was thrown down and his foot was injured. Please state whether or not plaintiff met with an accident at the time and place above mentioned, and if you answer that he did, state whether or not you were present and witnessed said accident. And if you say that you were present, when the accident occurred, then please state what you were doing and what, if you know, caused this accident?

A. He did. I was present. Was the engineer. As to the cause of the accident I cannot say what caused it as I did not make any examination of the obstruction or whatever it might have been at the time.

Q. If you have answered that you were present on the engine, when this accident occurred, then please state whether or not at or immediately prior to plaintiff's accident the pilot struck or came in contact with anything in front or on the track, and if so, what was this, what caused the pilot to strike this obstruction, if you know, and what effect, if any, did this have on the engine and pilot?

A. Indications show that we struck something as it broke the bottom slat on pilot.

Q. Please state fully as near as you can, the place where this accident occurred, the conditions of the track, the road-bed, rails and frog at the point and place where this accident occurred at the time and immediately after this accident, and state how you gained this knowledge?

A. The place was the west end of yard at Gallup, New
146 Mexico. As to the condition of the track, etc., I did not make any investigation and have no knowledge.

Q. Please state fully the conditions of the track and roadbed at and adjacent to the place where plaintiff met his accident with reference to whether or not the roadbed was wet or dry, soft or hard and state how you gained your information?

A. I did not make any investigation of the track or roadbed, as far as I know it was al- right for running over. I did not find anything wrong with track or rails until we struck this point where pilot was damaged.

Q. State what, if anything, was done with the engine immediately after this accident, that is whether or not the engine went forwards or backwards, also state whether or not it was day or night?

A. Put the injured man on the pilot and backed up to depot. This was during the night.

Q. Please state how long prior to this accident you had been employed by the Atchison, Topeka & Santa Fe Railway Company and in what different capacities and over what part of the road had you worked. Also please state whether or not you had ever ridden on the pilot of an engine or seen any of defendant's conductors or brakemen ride on the pilot of an engine, when doing switching in the yards or riding in the yards to open or close a switch, and if you answer that you have ridden — the pilot of an engine or seen others of the employees of defendant riding on the pilot while switching in the yards, or going to -pen and close a switch, then please state how often you have done or seen this done prior to April 30th, 1905, and at what different places, if any?

COUNSEL FOR DEFENDANT: We make the same objections as to the eighth and ninth that have been heretofore urged to the other objections.

COURT: I will overrule the objections.

COUNSEL FOR DEFENDANT: We except.

A. Twelve years as locomotive fireman and engineer on the Third District of the Albuquerque Division principally but had worked some on the Second District. I never rode on the pilot of an engine myself. I have seen Brakemen and Conductors frequently ride on the pilot of engine- in going to open or close switches, cannot say as to how often I have seen this done, but have seen it done
147 frequently at all places or most all places where occasion required it.

Q. Please state whether or not prior to April 30th, 1905, you knew and was familiar with the usual and customary practice of the conductors and brakemen employed by defendant in doing their work in the yards and at stations when switching cars, making up trains or when it became necessary to go with the engine to another part of the yard to open or close a switch or let an engine out on the main line?

A. Yes, I am familiar with the customary practice.

Q. If you answer that you know and are familiar with the usual and customary practice and way in which defendant's conductors and brakemen do their work in the yards or at stations, then please state whether or not it is usual and customary and the general practice of conductors and brakemen when switching in the yards or at stations or when it becomes necessary to follow the engine to or not ride on the pilot of the engine and if so, how long to your knowledge had this been the usual and customary practice, if you know.

A. It is the practice of conductors and brakemen to ride on pilots of engine-. I do not know how long, but since I began railroading at least it has been done.

The plaintiff introduced the depositions of R. B. LANCASTER, which are as follows:

Q. What is your name, occupation and place of residence, also please state whether or not you know the plaintiff, George A. Sowers and if so how long have you known him?

A. My name is R. B. Lancaster, occupation fireman, residence at Winslow, Arizona. Have personally known Sowers about five months.

Q. This is a suit brought by plaintiff against the defendant for damages for personal injuries. Plaintiff alleges that on or about the 30th day of April, 1905, while he was riding on a pilot of said engine through the yards at Gallup, New Mexico, the pilot struck a frog, guard rail, or some other obstruction and he was thrown down and his foot was injured. Please state whether or not plaintiff met with an accident at the time and place above mentioned, and if
148 you answer that he did, state whether or not you were present and witnessed said accident. And if you say that you were present when the accident occurred, then please state what you were doing and what, if you know, caused this accident?

A. Sowers met with an accident at the time and place mentioned. I was present but did not see the accident. At the time I was sitting on the seat box in the cab of the locomotive and cannot say what caused the accident.

Q. If you have answered that you were present on the engine, when this accident occurred, then please state whether or not at or immediately prior to plaintiff's accident the pilot struck or came in contact with anything in front or on the track, and if so, what was this, what caused the pilot to strike this obstructions, if you know, and what effect, if any, did this have on the engine and pilot?

A. The pilot came in contact with something at time of accident. Don't know what caused it or what the obstruction if any was. It broke the bottom slat on the right hand side of the pilot but had no effect on the locomotive.

Q. Please state as near as you can, the place where this accident occurred, the conditions of the track, the roadbed, rails and frog at the point and place where this accident occurred at the time and

immediately after this accident, and state how you gained this knowledge?

A. It happened in the west end of the yards at Gallup near switch. I have no knowledge of the condition of the track, roadbed, rails or frog.

Q. Please state fully the conditions of the track and roadbed at and adjacent to the place where plaintiff met his accident, with reference to whether or not the road bed was wet or dry, soft or hard and state how you gained your information?

A. I know nothing about it?

Q. State what, if anything, was done with the engine immediately after this accident, that is, whether or not the engine went forward or backwards, also state whether or not it was day or night?

A. The locomotive backed up to the depot after the accident. This was during the night.

149 Q. Please state how long prior to this accident you had been employed by the Atchison, Topeka & Santa Fe Railway Company and in what different capacities and over what part of the road had you worked. Also please state whether or not you had ever ridden on the pilot of an engine or seen any of the defendant's conductors or brakemen ride on the pilot of an engine when doing switching in the yards or riding in the yards to open or close a switch and if you answer that you have ridden — the pilot of an engine or seen others of the employees of defendant riding on the pilot while switching in the yards, or going to open and close a switch, then please state how often you have done or seen this done prior to April 30th, 1905, and at what different places, if any?

A. Have been employed since 13th of October, 1902. I first worked in the shops and on the 19th day of January, 1903, I commenced firing and have been so employed ever since. I have always fired on the Albuquerque division. I have ridden on the pilot frequently myself in opening and closing switches and have seen others often do so. I have seen it done at Gallup, Winslow and Seligman.

Q. Please state whether or not prior to April 30th, 1905, you knew and was familiar with the usual and customary practice of the conductors and brakemen employed by defendant in doing their work in the yards and at stations when switching cars, making up trains or when it became necessary to *do* with the engine to another part of the yard to open or close a switch or let an engine out on the main line?

COUNSEL FOR DEFENDANT: The same objections as before to all this testimony, and same exceptions.

A. I am familiar with it.

Q. If you answer that you know and are familiar with the usual and customary practice and way in which defendant's conductors and brakemen do their work in the yards or at stations, then please state whether or not it is the usual and customary and the general practice of conductors and brakemen when switching in the yards or at stations or when it becomes necessary to follow the engine, to or

not ride on the pilot of the engine and if so, how long to your knowledge had this been the usual and customary practice, if you know?

A. It is general practice of conductors and brakemen to ride on the pilot. Have always seen them do it.

150 Plaintiff introduced the depositions of C. E. CAIN, which are as follows, to-wit:

Q. What is your name, occupation and place of residence, also please state whether or not you know plaintiff, George A. Sowers, and if so how long have you known him?

A. C. E. Cain, residence Winslow, Conductor for the Atchison, Topeka & Santa Fe Railway Company. I have known George A. Sowers about a year.

Q. This is a suit brought by plaintiff against the defendant for damages for personal injuries. Plaintiff alleges that on or about the 30th day of April, 1905, while he was riding on a pilot of said engine through the yards at Gallup, New Mexico, the pilot struck a frog, guard-rail, or some other obstruction, and he was thrown down and his foot was injured. Please state whether or not the plaintiff met with an accident at the time and place above mentioned, and if you answer that he did, state whether or not you were present and witnessed said accident. And if you say that you were present, when the accident occurred, then please state what you were doing and what, if you know, caused this accident.

A. He met with an accident on or about this time. I was conductor riding on engine at the time. The pilot struck something and he was thrown down and injured. I cannot say positively what caused the accident.

Q. If you have answered that you were present on the engine, when this accident occurred, then please state whether or not at or immediately prior to plaintiff's accident the pilot struck or came in contact with anything in front or on the track, and if so, what was this, what caused the pilot to strike this obstruction, if you know, and what effect, if any, did this have on the engine and pilot?

A. The engine struck something or the pilot did breaking the bottom slat. What it was I could not say.

Q. Please state fully as near as you can, the place where this accident occurred, the conditions of the track, the road-bed, rails and frog at the point and place where this accident occurred at the time and immediately after this accident, and state how you gained this knowledge?

A. We were at the west end of No. 5 track at Gallup yard. This is the first time that I had been in on this track and could not
151 say what the condition was.

Q. Please state fully the conditions of the track and roadbed at and adjacent to the place where plaintiff met his accident, with reference to whether or not the roadbed was wet or dry, soft or hard and state how you gained your information?

A. I could not say as to the condition of this track as I had never been in there before. It was wet—had been raining previous to this

time. It was not raining at this time. I had been in and out of Gallup almost every day and knew that it had been raining.

Q. State what, if anything, was done with the engine immediately after this accident, that is, whether or not the engine went forward or backwards, also state whether or not it was day or night

A. It was after night. The engine went back from that point, back to depot.

Q. Please state how long prior to this accident you had been employed by the Atchison, Topeka & Santa Fe Railway Company and in what different capacities and over what part of the road had you worked. Also please state whether or not you had ever ridden on the pilot of an engine or seen any of defendant's conductors or brakemen ride on the pilot of an engine, when doing switching in the yards or riding in the yards to open or close a switch, and if you answer that you have ridden on the pilot of an engine or seen others of the employees of defendant riding on the pilot while switching in the yards, or going to open and close a switch, then please state how often you have done or seen this done prior to April 30th, 1905, and at what different places, if any?

COUNSEL FOR DEFENDANT: We interpose the same objections to all this testimony.

COURT: Overrule the objections.

COUNSEL FOR DEFENDANT: We except.

A. Between Gallup and Winslow for four years and six months as brakeman and conductor. I have ridden on the pilot of an engine quite frequently and have seen others do the same thing in doing switching in going to and from round houses or in riding to a switch at most all points.

152 Q. Please state whether or not prior to April 30th, 1905, you knew and was familiar with the usual and customary practice of the conductors and brakemen employed by defendant in doing their work in the yards and at stations when switching cars, making up trains or when it became necessary to go with the engine to another part of the yard to open or close a switch or let an engine out on the main line?

A. I am acquainted with the usual practice. It is the general practice of conductors and brakemen to ride on the pilot. This to my knowledge since I have been railroading about ten years.

Plaintiff introduces cross interrogatory No. 18 of witness CHARLES DAZE, which is as follows:

Q. Is it not a fact that in your statement of Form 1422 made June 1, 1905, at Winslow, Arizona, you stated that Sowers was standing on the lower slat of the pilot with his left foot dangling, that he was sort of standing sideways on the pilot, and is not that a fact?

A. That was my impression—he was standing on the pilot—could not see how his feet were placed. I could not see him standing on the pilot and it was my impression that he was standing on his right foot.

CHARLES DAZE, a witness for the defendant, being duly sworn, testified as follows:

Q. Have you been sworn??
A. Yes sir.
Q. What is your name?
A. Charles Daze.
Q. What is your business?
A. Locomotive engineer.
Q. How long have you been so employed?
A. As engineer?
Q. Yes sir?
A. About nine years.
Q. Whereabouts?
A. Santa Fe, running out of Winslow, Arizona.
Q. Where were you on the night of April 30th, 1905?
A. In the Gallup yards.
153 Q. Do you know the plaintiff, George A. Sowers?
A. Yes sir.
Q. How long have you known him?
A. That was the first time I met the gentleman.
Q. The first time you ever had him on your train or on——
A. Yes sir.
Q. Or on the engine with you?
A. Yes sir.
Q. Mr. Daze, how came you to be at the Gallup yards on that night?
A. I was in the employ of the service and ordered there—called out to take this train.
Q. How long had you been upon that engine when the plaintiff was injured?
A. You mean previous to that time? That same night?
Q. That same night?
A. I had been on the engine in the neighborhood of three hours.
Q. How long had you been engineer on engine 1143?
A. About 14 months.
Q. Was that engine in good or bad order?
A. In good order.
Q. Was it a freight or a passenger engine?
A. Passenger engine.
Q. What was the type or the style of the engine?
A. An ordinary ten wheel engine, known as the "Sidney big passenger engine."
Q. How many wheels were there to the front truck?
A. One pair of wheels.
Q. One pair of wheels only?
A. Yes sir.
Q. About what size were those wheels?
A. About thirty inches in diameter, I should judge.
Q. Then it was not a double truck?
A. No sir.
Q. You did not have two wheels on each side?

A. No sir.
Q. When you say 10 wheels, you mean four drivers on a side, and one small wheel on a side?
154 A. Three drivers on a side.
Q. Huh!
A. One back truck, and what is known as the travelers, and two large wheels.
Q. You have a small wheel back under the cab?
A. Yes sir.
Q. Then three drivers?
A. Yes sir.
Q. Then in the front you have one small wheel, the thirty inch wheel on each side?
A. Yes sir.
Q. That was a new type of engine wasn't it, at that time?
A. Yes sir.
Q. Do you know when plaintiff met with an accident?
A. Yes sir.
Q. When was it and where?
A. It was at the West end of the Gallup yards on track, I believe, known as Number five.
Q. About when?
A. Well, I believe about one *l*'clock in the morning.
Q. Of April 30th?
A. Of April 30th.
Q. Of this year?
A. Yes sir.
Q. At that time what were you?
A. Engineer.
Q. What was he?
A. Front brakeman.
Q. Where was he riding on the engine, if anywhere?
A. On the pilot.
Q. How was he standing with reference to the way the engine was going?
A. Well, I could see him very plainly as I had an electric head light, and it was burning brightly, and he was standing, as I should judge, about sideways to me, facing the center of the track.
Q. Which side, in your opinion, was nearest to you?
A. Left side.
155 Q. Was he on the right or left side of the pilot?
A. On the right side.
Q. Which side were you on?
A. Right side.
Q. That is the engineer's side?
A. Yes sir.
Q. What, if anything, did you notice happened to the plaintiff on the west end of the track No. five?
A. Where, you say.
Q. What, if anything did you notice happened to the plaintiff?

A. Well the first thing that I noticed that there was anything wrong was when I saw him tumbling off the pilot and I stopped almost instantly as we were running very slow at the time, and I got down and he showed me his foot.

Q. Stand up, please sir, and taking that point over there as being the point of the pilot, and show how he was standing?

A. Now, for instance, the engine was headed in this direction, where I should judge—suppose this is the pilot bottom, and the pilot point out here. He was standing about midway, I should judge, just in the act of stepping off the pilot. I was watching him very closely,—first thing, I saw him tumbling to the ground and I stopped instantly. Then he motioned about his foot.

Q. Did you stop because you saw him fall or because you felt any jerk to your engine?

A. I stopped because I saw him fall.

Q. You stopped for no other reason?

A. No sir.

Q. Did you feel any jar or jerk to your engine at that time or just before you stopped?

A. No sir I did not.

Q. When you stopped your engine, where was your engine with relation to the place where plaintiff stood or *lied*?

A. Well, the engine had not moved ten feet, I believe. Not to exceed that, anyhow, from the time he tumbled off the pilot.

Q. Were you past him—was the point of the pilot past him or not yet up to the point where he was?

156 A. Where he was lying on the ground?

Q. Yes sir?

A. Why, the engine had not got quite up to him.

Q. At the time when you stopped?

A. Yes sir.

Q. You had gone somewhere about ten feet?

A. Somewhere in that neighborhood.

Q. Are you certain when you got down as to whether or not anything had happened to the pilot?

A. Not at that time. The first thing that entered my mind was,——

COUNSEL FOR PLAINTIFF: Don't state what entered your mind, just state the facts.

A. That is a fact, ain't it?

COUNSEL FOR PLAINTIFF: Just state what you saw.

Q. State what you saw?

A. That is what I am going to do.

Q. Just state what you saw. What condition did you find that pilot to be in, if you examined it at that time?

A. I did not examine it, I did not know anything about the pilot being injured at that time.

Q. Didn't you feel at that time a jerk?

A. No sir.

Q. Didn't you before plaintiff tumbled off feel the engine go down?

A. No sir.

Q. Didn't you feel the front truck go down?

A. No sir, did not.

Q. Hadn't you begun to stop your engine before you felt the front truck go down?

A. No sir.

Q. When did you next examine the pilot or find out that anything had happened to the pilot?

A. After he called my attention to his foot.

Q. Where was he then?

A. Lying on the ground.

Q. When you examined the pilot, what did you find?

A. Found that the bottom band that goes around the pilot—the bottom part of the pilot was sprung inward, also that the bottom slat was splintered.

157 Q. Had any part of it left the slat?

A. No sir, I think not.

Q. How thick was the bottom slat of that pilot on the right side, and of what was it composed?

A. It was about two inches in thickness, composed of wood.

Q. Did it have any scrap of iron about it, if so, what was it?

A. There is an iron band that goes around the bottom slat of the pilot to strengthen it.

Q. Did, or did not, that pilot bend backward, or that slat, lower slat where he stood, bend backward or did it bend inward?

A. It bent inward.

Q. Back toward the engine?

A. Well, in towards the center of the pilot like.

Q. Was the iron bent?

A. You could see marks where something had jerked that bottom iron and sprung it inward.

Q. Sprung it inward?

A. Yes sir.

Q. About how much?

A. About three inches, I should judge.

Q. You had used that engine some 14 months?

A. Yes sir.

Q. About how high did that pilot ride above the top of the rail?

A. About two and a half or three inches, somewhere in that neighborhood.

Q. And this lower slat was about two inches thick?

A. Thick, yes sir.

Q. That would put the top of the lower slat about how high above the ball of the rail?

A. In the neighborhood of four inches, or four and a half.

Q. What was the condition of the weather, as to being rainy or dry at the time of the accident?

A. It had been raining, quite bad weather.

Q. How long had it been bad?

A. That I do not really know.

Q. How long had it been rainy, do you know?

A. No sir, I don't.

158 Q. I will ask you whether or not there were any low joints in the track?

COUNSEL FOR PLAINTIFF: We object to that, it makes no difference one way or another, we are not alleging low joints in the main line. Immaterial, irrelevant. You can prove the condition of the road at or in the immediate vicinity of the accident, but not at any other or different point or part of the road.

COUNSEL FOR DEFENDANT: That is not the object of this inquiry. The object is to show that that pilot went over similar places, without any sort of trouble, or coming in contact with the guard-rail, frog, track or anything.

COURT: I will sustain the objection.

COUNSEL FOR DEFENDANT: The defendant excepts, and expects to prove by the witness in answer to question just propounded,——

COUNSEL FOR PLAINTIFF: Object to counsel stating what he expects to prove before the jury.

COURT: Sustain the objection.

Q. You stated, as I understand you, that the pilot was not bent up at all?

A. No sir.

Q. That so far as its height above the rail, frog or switch was concerned, it remained in that same situation?

A. Yes sir.

Q. Did you use that engine after this accident?

A. Yes sir.

Q. Where did you run with it—to what point?

A. From Gallup to Winslow.

Q. How long a journey did you make with this engine, with the pilot in the condition that it was, after the plaintiff was injured?

A. 128 miles.

Q. Was or was not the track, joints, frogs and switches over which you ran your engine after this accident, injury, during that 128 miles similar to the place where the plaintiff was injured?

A. So far as I know it they were.

Q. Similar places?

A. Places.

Q. State whether or not your pilot of that engine during

159 that 128 miles struck any frog or switch or track.

A. None, whatever.

Q. None whatever?

A. No sir.

Q. Did you examine plaintiff's condition, or his foot at the time of the accident?

A. Why I did not make a very close examination, but the man was suffering pain, and the object was to get him back to where he could get medical attention.

Q. Knowing the material of which that pilot was built, knowing that the front of it was banded with a band of iron, and also knowing the position in which plaintiff stood, and further knowing that this

is the shoe *where* he wore at that time, which has been stated by him, what would you say made that mark on the sole of that shoe?

COUNSEL FOR PLAINTIFF: We object to that.
COURT: Will overrule the objection.

Cross-examination:

Q. You did not see that foot while it was being cut off?
A. No sir.
Q. You don't know in what position his foot was?
A. No sir.

COUNSEL FOR PLAINTIFF: We object to that.
COURT: Overruled the objection.

Redirect examination:

Q. What part of the pilot what you say, if anything, that made the imprint on the sole of that shoe?
A. What part of the pilot?
Q. Yes sir.
A. Well, that I could not positively say, as I told you, the way I had it figured out,——

COUNSEL FOR PLAINTIFF: We object to that. Let him state the facts, not what he figured out.

A. I cannot state what caused that.
Q. Is that the right or left shoe?
A. I should judge the right shoe.
Q. Mr. Daze, when you first stopped your engine what did you do?
160 A. Got down and went to Mr. Sowers where he was lying on the ground.
Q. Did you or not back your engine before you went to Mr. Sowers?
A. No sir.
Q. Then you went to him from where your engine first came to a stop?
A. Yes sir.
Q. How long from the base or back of the pilot, or how far would it be to where the plaintiff stood upon the lower slat of the pilot?——
A. I don't understand the question.
Q. I will illustrate. Assuming that as the back of the pilot?
A. Yes sir.
Q. And this as the slat on which he stood?
A. Yes sir.
Q. Down in the bottom. How far was it, in feet or inches, from the base—we will draw this as the base of the pilot—to where he stood from the rail or from the track?
A. I cannot understand just exactly what you are getting at?
Q. You know the heel of the pilot—call it the heel of the pilot?
A. Yes sir.
Q. The heel is where it joins to the engine?
A. Yes sir, where it connects, or the pilot begins.

Q. From the heel of the pilot how many inches or feet was it to where he stood on the pilot?

A. You mean ahead of the pilot?

Q. Yes sir.

A. Well, I should judge two and a half feet; the pilot slat is about five feet in length, I judge Mr. Sowers was in about the center of the slat.

Q. From here, you mean?

A. Yes sir.

Q. Two and a half feet? How near to the heel of the pilot do the wheels—the front wheels come?

A. Why it cannot be more than two feet and a half or three feet at the outside from the heel of the pilot itself to the engine truck.

Q. To where it strikes the rail?

A. Yes sir, between the heel of the pilot and the axle.

161 Q. Axle?

A. Yes sir.

Q. You say you had used this engine how long?

A. In the neighborhood of 14 months.

Q. You — familiar with all its parts and its general make up?

A. Yes sir.

Q. Do you know how the rods on the pilot were arranged?

A. Yes sir.

Q. You know whether or not there were any curves—cuts on the front side of the pilot?

A. Any curves, you say?

Q. Curves for men to stand in?

A. Was none, whatever.

Q. You mean to say that in the two slats, or the slat just above the lower slat there was no curves or hollow place?

A. That is what I mean to say.

Q. None whatever?

A. None whatever.

Q. You will please take two books or one book, and curve this, show the jury—say that represents the lower slat of the pilot?

A. Yes sir.

Q. Let this represent the next slat on the right hand side, you show the jury their relation to each other?

A. The pilot was built so the slats ran in a horizontal position—in that position.

Q. One over the other?

A. One right over the other.

Q. How far back from the outer edge of the lower slat, the front of the lower slat, was the front or edge of the second slat?

A. You mean this way?

Q. Yes sir.

A. Probably in that position, about an inch difference.

Q. You say an inch—do the two bottom slats on the right hand side curve in or straight?

A. Perfectly straight.

Q. The same as this?
A. All the way up.

162 Recross examination:

Q. You are still working for the defendant?
A. Still working for the railroad company.
Q. Yes sir.
A. The Santa Fe Railroad Company?
Q. Yes sir.
A. Yes sir.
Q. Drawing pay for your expenses down here?
A. Yes sir.
Q. I will ask you if you know who your fireman was that night?
A. Yes sir.
Q. Who was it?
A. R. R. Lancaster.
Q. I will ask you immediately when this accident happened at that time, if you did not state to Mr. Lancaster, or remark that the engine was on the ground—off the track, and you thought you had broke your brakeman's leg?
A. The remark I made was this: The first thing that came into my mind was the engine truck had left the track?
Q. What made that impression.
A. When I seen him tumbling off I supposed that was what the trouble was.
Q. You did remark that your engine truck was off and you had broke your brakeman's leg?
A. Yes sir.
Q. Now you were keeping a lookout ahead?
A. Sir?
Q. You were keeping a lookout ahead?
A. Yes sir.
Q. You sure there was no obstruction on that track?
A. None, whatever.
Q. Could have seen it if there was?
A. There might have been some small obstruction, I may not have noticed.
Q. Is that your signature?
A. Yes sir.
Q. Now, how was the plaintiff's right foot?
A. How was it?
163 Q. Yes, sir, just prior to the accident?
A. That I cannot state exactly, just as I supposed it was, as I told you before.
Q. How was it, just state of your own knowledge.
A. I say just as I supposed it was before, I cannot state positively how it was.
Q. Your impression was he was standing on his right foot?
A. No sir, the left foot.
Q. The left foot?
A. Yes sir.

Q. Did you have these depositions read over to you?
A. No sir.
Q. Did you sign that?
A. That is my signature there.
Q. Did the Notary read them over to you?
A. No sir.
Q. He took them down, when you looked them over?
A. Yes sir.
Q. Did you read them over?
A. Yes sir.
Q. You read them over and not know what they said?
A. That is my signature.
Q. Is it the truth stated in here?
A. Which?
Q. These depositions the truth?
A. I swore to the truth.
Q. That is what you swore to?
A. That is my signature.
Q. That is what you swore to?
A. I don't know what is down in there now.
Q. You knew it was to be used as evidence in this case?
A. Certainly.
Q. And supposed to tell the truth?
A. Yes sir.
Q. Then you told the truth then?
A. So far as my knowledge goes.
Q. Have you talked to anyone about this case?
164 A. No one whatever.
Q. Have not spoken to counsel about it?
A. No sir.
Q. Since that time to this time?
A. Possibly a few remarks, have not expressed my opinion in any way.
Q. You have not talked to any one about the facts of this case from the time of the occurrence to this time, then you spoke when you gave these depositions?
A. No sir.
Q. You certain of that?
A. Yes sir.
Q. Certain of that as you are of any other testimony, are you?
A. Just as certain.
Q. What were you talking about in there awhile ago?
A. Well, we got permit from the Court,——
Q. That is al- right. Then you have talked to somebody then?
A. I thought you meant before to-day.
Q. Did you talk to Mr. Franklin out at Gallup?
A. No sir.
Q. Or anyone out at Gallup?
A. No one, only to — took the testimony.
Q. When you gave the testimony you told the truth?
A. Yes sir.

Q. Yes sir?
A. I am telling the truth now too.
Q. Then if you said: "I could see him standing on the pilot, and it was my impression he was standing on his right foot,——
A. There is a mistake there.
Q. Oh, it is a mistake now?
A. I never made that remark.
Q. You swore to it?
A. I always said he was standing on his left foot.
Q. You swore to that?
A. There is some mistake there.
Q. Al- right. You did make that remark when you seen the man fall, that you thought you—you thought the forward
165 truck was off the track?
A. That was my first impression.
Q. And as a matter of fact it turned out you was on the track, but on a low joint?
A. I don't know whether I was on a low joint, or not.
Q. You never made any examination did you?
A. No sir.
Q. None whatever?
A. None whatever.
Q. Just took the engine and went right back?
A. Yes sir.
Q. Put him on what?
A. Put him on the pilot.
Q. Why did you put him on the pilot?
A. Because it was the most convenient place.
Q. The most convenient place on the engine?
A. The most convenient place to carry him back.

Redirect examination:

Q. You did not put him down on the pilot slat?
A. No sir, right on the pilot beam.
Q. What is the pilot beam?
A. A big piece of timber which the pilot is fastened to and this beam is fastened to the engine.
Q. How big a piece of wood is that pilot beam?
A. Probably fourteen or fifteen inches square.
Q. State whether or not it is a safe place for a man to ride?
A. Yes sir.
Q. I will ask you this, if the plaintiff had been riding on that pilot beam, sitting on that pilot beam, whether or not he could have been injured at the place he was injured?
A. No sir, he could not have been injured.
Q. Connected with that pilot beam, how much of a platform, if any, is that in front of the engine?
A. Is not any platform.
Q. It is the width of this pilot beam?
A. Yes sir.

Q. How wide did you say that is?
166 A. Fourteen or sixteen inches square.
Q. If a man was sitting on that pilot beam, as I said, how far would his feet be from the ground?
A. I do not know just exactly, that pilot beam is in the neighborhood of four feet above the rails.
Q. Then how far would his feet be above the rails?
A. I should say they ought to be twelve inches from the bottom of his feet to the rail, I should judge, about 12 inches.
COUNSEL FOR PLAINTIFF: About twelve inches?
A. Somewhere in that neighborhood.

Recross-examination:

Q. And the pilot four feet high?
A. Yes sir.
Q. What would make his feet three inches?
A. No sir.
Q. From his knees down.

5 O'CLOCK.

Q. Mr. Daze, you say it had been raining prior to this accident?
A. It was raining, yes sir.
Q. This was the usual summer rain?
A. Summer rain?
Q. Yes sir.
A. I don't know whether the rain was usual, customary, or otherwise there at that time.
Q. There was no cloudburst anything like that?
A. I ain't prepared to say.
Q. I mean in that whole country. You know it had rained that much before while you been working there?
A. The rain was customary. I don't know whether any harder or any lighter.
Q. That is what I am getting at. Same summer rain?
A. So far as I know.
Q. You have a great many heavy rains there. It rains a great deal there every summer, does it not?
A. The summer seasons are very dry.
Q. This was one of the unusual wet summers?
A. So far as I know.
167 Q. But not any wetter than you had seen it before that time?
A. No sir.
Q. From the position where Mr. Sowers was standing, you could only see his head and shoulders?
A. That is about all.
Q. You could not see his feet?
A. No sir.
Q. You did not know how he was standing?
A. No sir.
Q. You all backed up after the accident?

A. Yes sir.
Q. And went out on the main line?
A. Yes sir.
Q. Did not got back down on track No. five?
A. No sir.

Redirect examination:

Q. You stated in your depositions when he was standing there—it appears you said that he was standing on his right foot?
A. That was the supposition.
Q. You meant to say he was standing on his left foot with his left hand on the timber?

COUNSEL FOR PLAINTIFF: He has testified he meant to say he was standing on his right foot.

Q. I am asking him now what he intended to say in the depositions? What did you intend to say in your depositions as to what foot the plaintiff was standing upon?
A. On the left foot, just about in the act of stepping off.

Recross-examination:

Q. You don't know of your own knowledge how he was standing?
A. I cannot say positively because I could not see either one of his feet at all.

Mr. GUS STORMBURG, a witness for the defendant, being duly sworn, testified as follows:

168 What is your name?
A. Gus Stormburg.
Q. Where do you reside.
A. Gallup.
Q. New Mexico?
A. Yes sir.
Q. How long have you lived at Gallup?
A. 16 years.
Q. What business are you engaged in?
A. Section foreman.
Q. For what road?
A. The Atchison, Topeka & Santa Fe coast line.
Q. What is your district—territory.
A. Two miles.
Q. Where?
A. Gallup yards.
Q. Including the West yards?
A. No sir.
Q. Huh!
A. It don't include the west yards.
Q. How far are the west yards from Gallup?
A. Four miles.
Q. Four miles out. Does it include the yards at Gallup?

A. At Gallup?
Q. Two miles of the yard at Gallup?
A. Yes sir.
Q. That means a mile on each side of the station?
A. About.
Q. What were you doing on the 30th day of April this year?
A. If I am not mistaken I think I was in Gallup.
Q. What was your business about that time?
A. I was section foreman.
Q. At the same place?
A. Yes sir.
Q. You know track No. five?
A. Yes sir.
Q. How long have you known track No. 5?
169 A. Ever since I started in to work for the company, or ever since that it was laid.
Q. You know the road and track No. five?
A. Yes sir.
Q. Mr. Stormburg, do you know how a frog is constructed?
A. Yes sir.
Q. You know how the frog leading into track number five is constructed?
A. Yes sir.
Q. And at the junction of the main line from which track Number five starts?
A. Yes sir.
Q. Describe to the jury how that frog was made, and if you desire you may use any drawing or blue print?
A. I have a blue print here.
Q. I will ask you before you show it to the jury: Is that blue print a blue print of a frog similar to the frog on track Number five?
A. Yes sir.
Q. You may stand up here and show the jury, what do you mean by a frog—what it takes to make a frog?
A. This is what is called the wing where—and also this one, and here is the point and here is the casting. Now the whole thing is held together by this clamp; you see there is a steel clamp here.
Q. What now, would be a continuation of the rail on the right side of track number five, going West?
A. This rail here.
Q. This would be a continuation of the rail?
A. Right here.
Q. Then that is going West? When *they* going East that part of the frog would be a continuation?
A. Yes sir.
Q. This would be the inside wing of the frog right here?
A. Yes sir.
Q. Yes sir, that is, this way?
A. Yes sir.

170 Q. That is right?
A. There is another track, here is six, there is number five.
Q. You say these clamps come around under?
A. They go under the frog.
Q. To bind it together.
A. To bind together.
Q. Are the frogs made by the track men, section men, or made somewhere else?
A. This frog is made by Pettibone & Murphy.
Q. Made at the factory?
A. Yes sir.
Q. Do they come in parts or altogether in one piece?
A. Come altogether.
Q. What had been the condition of the weather prior to this first day of May, of this year, for some weeks past?
A. Raining and snowing.
Q. To what extent?
A. Enormous amount.
Q. Enormous amount. Had you been working altogether in the yards or elsewhere?
A. I had been out on the main line.
Q. Why?
A. On account of so much rain and bad track—soft track—soft road bed.
Q. What condition had that continuous and enormous amount of raid left the main line in?
A. In a bad condition.

COUNSEL FOR PLAINTIFF: Object to that.

Q. In what condition had it left the track generally in?

COUNSEL FOR PLAINTIFF: Object to what is the condition of the track.

Q. What force were you employing at that time on these yards and track, Mr. Stormburg?
A. I don't know exactly, there was no limit.
Q. Why did you not employ more men to keep these tracks in better condition?
A. Could not get them.
Q. Could not get them in the country?
171 A. No sir.
Q. Could not be had. What effort did you make to employ men?
A. Well, we hired everything we could.
Q. I will ask you now about track number five. Did you know anything about the plaintiff's being injured on the 1st day of May of this year. He was injured on the night of the 30th day of April.
A. Yes sir.
Q. Did you know anything about it the next morning?
A. No sir.
Q. When did you first hear of it?
A. About two weeks later.

Q. How did you hear of it?
A. I was told by a brakeman or switchman.
Q. Did anybody point out to you where he was said to have been injured?
A. Yes sir, some switchman pointed it out to me.
Q. Where did he tell you he was injured?
A. He did not know.
Q. Did you ascertain from any source that the plaintifi claimed to have been injured at the frog of switch Number five?
A. No sir.
Q. Who was this switchman?
A. Man named Howard.
Q. Howard?
A. Yes sir.
Q. Did you have occasion since to—any time after April 30th, 1905, this year, to go to the frog of track No. five?
A. Yes sir.
Q. About how long after the 1st day of May was it?
A. Two weeks.
Q. Did you make any examination of it?
A. I did not understand.
Q. I say, did you have occasion after the 1st day of May this year, since the plaintiff was injured to go and examine the frog of track number five?
172 A. Yes sir.
Q. How long after the 1st day of May was it?
A. Two weeks.
Q. What were you doing there?
A. I was unloading cinders.
Q. Now had you heard at that time that the plaintiff had been injured there?
A. I heard that a person had been injured, but I was told that it was some car repairer had been injured.
Q. Were you told the name?
A. No sir.
Q. Did you receive any report from anybody of the bad condition of this frog at any time?
A. No sir.
Q. Never have. Does any other section foreman work in those yards besides yourself?
A. Yes sir.
Q. Anybody else work on this track, besides—this track No. five?
A. No sir.
Q. How long have you had the control of track number five?
A. For two years.
Q. Two years back. Had you heard at any time of more than one man being injured at this place?
A. No sir—yes sir.
Q. Who?
A. Why Howard told me that Mr. Sowers was the man that was injured.

Q. That he was the man?
A. Yes sir.
Q. Was he the man that Howard was talking about?
A. Yes sir.
Q. Then it was not a car repairer?
A. No sir.
Q. After you had learned that somebody had been injured at this frog did you make any examination of it?
A. Yes sir.
Q. What condition did you find it in?
A. In good condition.
173 Q. Tell the jury whether or not there was anything the matter with the frog. Switch number five?
A. Nothing at all.
Q. Did you examine the track adjacent to this frog on track number five?
A. Yes sir.
Q. Attached to that frog on the east—what kind of a rail was that?
A. Sixty five pound rail.
Q. How long was that sixty five pound rail?
A. About twelve feet.
Q. What was the size of the rail which composes the wing?
A. Yes sir.
Q. I say what was the size of the rail that composes the frog?
A. 65 pounds.
Q. This is the approach rail for 12 feet on the east, and the frog was the same size per yard?
A. Yes sir.
Q. Which was 65 pounds per yard?
A. Yes sir.
Q. I will ask you if you remember—I will ask you to state to the jury the condition of the joint rail and 12 foot rail, which is attached to the frog?
A. In good condition.
Q. Was or was not there a low joint there?
A. Yes sir.
Q. At the juncture or at the connection of this 12 foot rail with the frog?
A. No sir.

Cross-examination:

Q. Mr. Stormburg this rain that you spoke of, was the usual spring or summer rain?
A. No sir.
Q. Sir?
A. No sir.
Q. You had had that kind of rain before, hadn't you?
A. Not as long as I had been in the country.
174 Q. How long had you been up there?
A. Sixteen years.
Q. It was not a water spout or anything like that?

A. No sir.
Q. Just a hard rain?
A. Hard rain and snows all the way through.
Q. Was raining and snowing. You say you did not examine this track for two weeks after Mr. Sowers was injured?
A. No sir.
Q. You did not know its condition at the time he was injured?
A. Yes sir.
Q. How did you know it?
A. It was in good condition.
Q. How do you know?
A. I was working there at least two days before the injury.
Q. I mean right at the time of the injury, you was not there?
A. No sir.
Q. Was there anything done towards repairing that frog from the — Mr. Sowers was hurt up to say forty days after the accident?

COUNSEL FOR DEFENDANT: I don't think that is material, your honor, please,—the condition existing at the time Mr. Sowers was injured.

Q. That is what I want to show. I want to show that the condition of the track was the same as it was when he was injured?

COUNSEL FOR DEFENDANT: If that is the object I have no objection.

Q. Now this frog was in the same condition forty days after the accident that it was the date of the accident?
A. Yes sir.
Q. Had not been changed, or remodeled or rebuilt?
A. The frog is the same to-day as it was at the time of the accident.
Q. Never been raised or lowered?
A. It has been raised.
Q. It has been raised?
A. Yes sir.
Q. When was it raised?
A. I cannot give you the date, it was last summer.
175 Q. I mean was it within the forty days?
A. I am not able to say.
Q. Just give us your best judgment?
A. It was done last summer.
Q. This accident was the 30th day of April.
A. Yes sir.
Q. Now, can you say it was done after the 15th of June?
A. No sir, I don't think so.
Q. When was it done?
A. Well, some of it was raised before the 15th and some of it was raised after the 15th.
Q. I am talking about this particular track.
A. I have no idea about this.

Q. You raised it to put new ties under?
A. No sir.

COUNSEL FOR DEFENDANT: We object to this, same objection made awhile ago.

Q. Look at that picture. Is that a fair representation of track number five now and at the time the plaintiff was hurt?
A. Yes yes—no—this part here is—this track—the frog during the time of the accident.
Q. What part do you mean now?
A. Right here.
Q. Which direction from the frog?
A. Here is that heavy piece of rail I was talking about.
Q. Yes sir?
A. That joint there was soft.
Q. You mean that the track immediately back towards the depot—what direction was that in?
A. East.
Q. Then you mean the part of the track east of the frog was soft at the time of the accident?
A. Part of it, yes sir.
Q. Was soft?
A. Yes sir.

Q. You say this little short piece of rail attached to the
176 frog on the east is about how many feet long?
A. About twelve feet.

Q. That 65 pound rail?
A. Yes sir.
Q. Now the next rail east of that, what size rail is that?
A. 56.
Q. That 56 pound rail? Is a very short piece of rail on each side?
A. No sir.
Q. Now, I will ask you again, Mr. Stormburg, if the wings of that frog are of the same height now as they were at the time of Mr. Sowers' injury?
A. Yes sir.
Q. Then they were of the same height continuously from the time Mr. Sowers was injured for at least forty days after he was injured?
A. No sir.
Q. No change?
A. No sir.
Q. What was the duty of the other section foreman in the yard?
A. He was up on the mine track.
Q. On the mine track?
A. Yes sir.
Q. You don't know the exact condition of this track right at the time of the accident?
A. Yes sir.
Q. You were not there?
A. Well, the frog has not been changed.

Q. Has not changed.
A. No sir.
Q. Just the same now and continuously since the accident?
A. Yes sir.
Q. Rails all the same?
A. Yes sir.
Q. That is the same piece of rail—all the rail?
A. Yes sir.
Q. You are still working for the railroad company?
A. Yes sir.
177 Q. It is the duty of the section man to keep the track in repair, is it not?
A. Yes sir.
Q. And it is their duty to inspect the track?
A. Yes sir.
Q. And to see they are in a reasonably safe condition for trains to run over?
A. Yes sir.
Q. This track number five was used by the Santa Fe?
A. Yes sir.
Q. All the time?
A. Yes sir.

Redirect examination:

Q. How far east of the frog did you say this soft track was?
A. About 15 or 16 feet, clear back.
Q. Tell the jury whether or not that was the nearest soft place to the track? This place you say was 15 feet east where you say was a piece of soft track—at the end of that 12 feet of 65 pound steel—that the nearest soft place on the east of that frog?
A. The joint between the 65 and the 56.
Q. The soft place?
A. Yes sir.
Q. How far was the frog from that?
A. The piece of steel is about 12 feet.
Q. Piece of steel between the 65 and 56 is about 12 feet. How long from the frog was the soft place in the track?
A. Between fourteen and fifteen feet.
Q. To what extent was track number five used before the first day of May, 1905?
A. Every day.
Q. To what extent was it used after the 1st day of May?
A. Every day, there was no stop.
Q. What kind of engines went over it?
A. All classes.
Q. You said something about raising this place. Did you do any general work on track number five?
178 A. Yes sir.
Q. Raised track five, *answer* else?
A. Five and six.
Q. Raised them throughout the whole distance?
A. Yes sir.

Q. Raised the yards—the entire yards did you? Now, did you at any time after the 30th day of April know or hear of any pilot of any engine striking the frog of track five?
A. No sir.
Q. You say it was used continuously all the time?
A. Yes sir.
Q. You did not go there you say until two weeks after?
A. Yes sir.
Q. Did any employee report to you any defective condition with the frog of track No. five?
A. No sir.
Q. Would it have been the duty of anybody operating an engine or train, discovering a bad piece of track, to have reported it to you?
A. Yes sir.
Q. You say no such report was made to you?
A. Their duty to report to the road master.
Q. How is that?
A. It is their duty to report to the road master.
Q. Did you at any time get any notice or order that this frog was in a bad condition?
A. No sir.
Q. Where is the roadmaster's office?
A. In Gallup.
Q. Right there with you in the same town?
A. Yes sir.
Q. When you say you raised track five or six, state to the jury if that was general work or done for some specific purpose?
A. General work, or what we call ballasting.
Q. Ballasting the yard?
A. Yes sir.

179 Mr. C. E. CAIN, a witness for the defendant, being duly sworn, testified as follows:

Q. What is your name?
A. C. E. Cain.
Q. Where do you live and what do you do?
A. Railroad conductor, employed by the Santa Fe.
Q. Where?
A. Winslow, Arizona.
Q. Still employed?
A. Yes sir.
Q. You are here at the request of the Railroad Company?
A. Yes sir.
Q. The railroad company is paying your expenses down here?
A. Yes sir.
Q. What were you doing about the 30th day of April, 1905?
A. Running a train on the second division of the Santa Fe.
Q. What is the second division?
A. Between Gallup and Winslow.
Q. Short run?
A. Yes sir.

Q. How long a run did you have?
A. 126 miles.
Q. Were you running there on the night of the 30th day of April, this year?
A. Yes sir.
Q. Tell what happened there so far as your leaving Gallup was concerned. You left Gallup more than once that night, left once that night and once the next morning?
A. Yes sir.
Q. How early the next morning?
A. About one o'clock.
Q. You started out of Gallup about one o'clock with a passenger engine?
A. Yes sir.
Q. Was the plaintiff about the engine?
A. Yes sir.
180 Q. On what track did you start from the depot or through the yards?
A. We left the depot on the main line.
Q. Went up east and got on track number five?
A. West rather, started off out over the main line.
Q. Turned West over track number five?
A. Yes sir.
Q. How far did you go on track number five before the engine stopped?
A. To the west end of it, I think, somewhere near the west end.
Q. Had no train?
A. Yes sir.
Q. You riding in the cab of the engine?
A. Yes sir.
Q. Who was with you?
A. The engineer and fireman in the cab.
Q. What were their names?
A. Charles Daze and R. B. Lancaster.
Q. Did anything occured when you reached about the west end of track number five?
A. Yes sir.
Q. Did the engine stop?
A. Yes sir?
Q. What did you first know about the happening of any event when you were approaching the west end of track number five?
A. Why when the engineer told me,—when he stopped.
Q. What did you find of your own investigation?
A. I went out with the engineer and found Mr. Sowers lying on the ground.
Q. How near were you then to the end of track number five?
A. Well I cannot say exactly, probably thirty, forty or fifty feet. I don't know just the distance.
Q. State whether or not you noticed the location of any frog at that time?
A. I did not.

Q. When the engine stopped what did you do?

A. Went down and picked Mr. Sowers up and placed him
181 on the pilot.

Q. What part of the pilot did you place him on?

A. On the top of it.

Q. What do you call it?

A. Well, the top of the pilot. I don't know now what you do call it. Placed him on top of the pilot.

Q. Is there a part of the pilot called the pilot beam?

A. Pilot beam, yes sir.

Q. What is the pilot beam?

A. A large timber about 12 by 12, fastened on to the front of the engine, and the pilot is bolted on to that.

Q. Yes sir. And you put him up on that?

A. Yes sir.

Q. Did you notice jarring or jerking or other movement of the engine before it stopped?

A. No sir.

Q. Did you feel any unusual or sinking motion of any part of the engine before it stopped?

A. Did not.

Q. Did you ' that time examine the condition of the pilot?

A. Why just glanced at the pilot was all. Never made any examination of it.

Q. What did you do with this engine after that accident—where did you go first?

A. Went back to the depot.

Q. And left the plaintiff there?

A. Yes sir.

Q. Then what did you do?

A. Took the engine and went out the west yard about four miles and got the other train and went to Winslow.

Q. How far to Winslow?

A. 128 miles.

Q. The train you were after then was in the Winslow yards?

A. Yes sir.

Q. What was the condition of the track, how did you run that engine after this accident—any soft places in any part of it?

COUNSEL FOR PLAINTIFF: That is leading.

Q. State whether or not you passed over any soft place
182 with your engine?

A. Yes sir.

Q. Well, did anything occur to the pilot after that?

A. No sir.

Cross-examination:

Q. Mr. Cain, you say you were the conductor?

A. Yes sir.

Q. And Mr. Sowers was your brakeman?

A. Yes sir.

Q. How long had Mr. Sowers been braking with you, Mr. Cain?
A. I cannot say exactly, I think about two weeks.
Q. He been with you on all your runs?
A. He had made several trips.
Q. I mean since that time he had been with you on all your runs?
A. Yes sir.
Q. You had never been in on this Number five before that night?
A. Well, not to my knowledge for a month or two.
Q. Sir?
A. I had not been in there lately.
Q. I believe your deposition was taken out at Winslow?
A. Yes sir.
Q. I believe you stated to the Notary out there you had never been in on track number five before that night?
A. No sir.
Q. Sir?
A. No sir.
Q. You state out there that you had never been in on that track before that night, that true, isn't it?
A. I won't swear to that.
Q. Didn't you swear to these depositions?
A. I did.
Q. You knew what they were?
A. I don't think I swore I was never on that track?
Q. Now to interrogatory number four in that deposition out there you said: "We were at the west end of No. 5 track at the Gallup yards." That true?
A. Yes sir.
Q. "This is the first time that I had been in on this track
183 and could not say what the condition was?"
A. What I mean to say was the first time on the track for more than six months, eight months or a year.
Q. That your signature?
A. Not there.
Q. Is not that your signature?
A. No sir.
Q. That is?
A. Yes sir.
Q. You signed them before Mr. Flinn the Notary?
A. Yes sir.
Q. Mr. Flinn took down what you said, also asked you if that is your signature—that last one?
A. That is my signature.
Q. You knew what was in this paper when you signed it?
A. Yes sir.
Q. You knew what was in this one?
A. Yes sir.
Q. Now, Mr. Cain, you say you made no examination of the track that night?
A. No sir.
Q. Mr. Sowers was put back on the engine, and taken back up to the depot?

A. Yes sir.

Q. Ran down and got off number five and on to the main line, that right?

A. How is that?

Q. You backed back to the depot, and let Mr. Sowers off, and then got on the main line and went on with your train to the west yards?

A. Yes sir.

Q. Now you state that you backed back and went on the main line and got your train at the west yard at Gallup?

A. Yes sir.

Q. Then proceeded to Winslow?

A. Yes sir.

184 Q. And how far is it from the west yard down to the depot at Gallup, five or six miles, ain't it?

A. Four miles, I think.

Q. Four miles? What time did you couple up to your train at—couple this particular engine to your train—what time in the morning?

A. I cannot say to that.

Q. You know what time you got out?

A. 2:30 or 3 o'clock, somewhere along in there.

Q. About three o'clock. What time did you get to Winslow with your train?

A. About noon the next day, or that day rather, the same day.

Q. About noon?

A. Yes, sir.

Q. Your recollection is now you got out about three in the morning and got at Winslow about noon?

A. Yes sir.

Q. You traveled about how many miles?

A. 128.

Q. Without any accident whatever?

A. No sir.

Q. You spoke something about what Mr. Daze—what is his name?

A. Daze?

Q. You spoke about what Mr. Daze said at that time?

COUNSEL FOR DEFENDANT: No he did not.

Q. You said you only knew from what Mr. Daze said?

COUNSEL FOR DEFENDANT: I did not bring out anything what Mr. Daze said.

Q. Need not tell what he said. When was it he made this remark you referred to in your direct examination—when was it?

A. The time—where was it—or time?

Q. The time—that is, what were you doing—when was it—I will ask you this question, is not it a fact, Mr. Daze made this remark at the time he felt his air,——

A. You want to know what he said?

Q. No, not now. But he made a remark at the time he applied the air, is not that true?

185 A. Yes sir.

Q. Now then, what was the remark?

COUNSEL FOR DEFENDANT: The witness is here. I don't think if this witness would repeat it it would — proper—it is hearsay testimony. What would Mr. Daze, anything he may have said at the time——

COUNSEL FOR PLAINTIFF: We will withdraw the question from this witness.

Q. Now pay attention to what I say, Mr. Cain. This is supposed to be a report,——

COUNSEL FOR DEFENDANT: We object to that, it is no way to contradict the witness to ask him if he did not make a certain statement, and ask him if it — not true.

COURT: I will sustain the objection.

Q. Mr. Cain, I will ask you if you did not make a statement in writing to Mr. Sowers on the 24th day of June, 1905, about the condition of this track?

A. I don't know that I referred to any special part of the track?

Q. In that statement is not it a fact,——

COUNSEL FOR DEFENDANT: I object to that,——

Q. — In that statement is not it a fact that you stated that the point where this accident occurred that the track was very soft?

COUNSEL FOR DEFENDANT: The statement shows for itself.

Q. Is not it a fact, Mr. Cain, the track where Mr. Sowers met with his accident at the time he met with his accident, was very soft.

A. Well, it was soft all over, not very much difference anywhere, when it came to being soft.

Q. Is not it a fact that cow-catcher or the pilot struck something that was very hard and broke the cow-catcher?

A. Yes sir.

Q. Now, we offer this statement may it please the court.

COUNSEL FOR DEFENDANT: To which we object.

COURT: Sustain the objection.

COUNSEL FOR PLAINTIFF: We except.

Redirect examination:

Q. Mr. Cain, could you see any marked difference in the
186 softness of the track?

A. Well, it was generally soft.

Q. Was — what made the track soft?

A. Heavy rains.

Q. Mr. Cain, just before this accident—just before going—getting to a spot, did you feel any unusual motion of the engine?

A. No sir.

Q. Did you feel any sinking motion to the engine as if it was going down?

A. None whatever.

Q. Did you experience any feeling indicating to you that there was anything unusual with the track or engine?

A. No sir.

R. B. LANCASTER, a witness for the defendant, being duly sworn, testified as follows:

Q. What is your name?
A. R. B. Lancaster.
Q. What is your business?
A. Locomotive fireman.
Q. Where?
A. Winslow, Arizona.
Q. What railroad?
A. Atchison, Topeka & Santa Fe.
Q. You know the plaintiff?
A. Do now, did not before the accident.
Q. You know when he was hurt?
A. Yes sir.
Q. What were you doing when he was hurt?
A. Discharging my duty as fireman.
Q. On what engine?
A. 1133.
Q. What were — doing just when he was hurt?
A. Sitting on the seat box.
187 Q. Of this engine. Did you know where he was?
A. No sir, I do not exactly know.
Q. Had you ever worked with him before?
A. No sir.
Q. Never pulled a train he was on?
A. No sir.
Q. How long had you known engine 1133?
A. Well, ever since I been working there, almost three years been working out of there.
Q. Good or bad engine?
A. Always considered a good engine.
Q. In or out of repair?
A. What was the question?
Q. Was it in good repair or in bad repair at the time?
A. In good repair.
Q. When did you first know of the accident to the plaintiff?
A. You mean the first time I ever seen him to know him?
Q. No sir, I asked you when you first knew of the accident to plaintiff. The accident to him, when he was hurt.
A. When I first knew it?
Q. Yes sir.
A. After the engineer stopped the engine.
Q. Before the engineer stopped the engine did you feel any jarring or jerking of the engine of any kind?
A. Did not notice any.
Q. You were sitting on the seat you say?
A. Yes sir.
Q. Did you feel any part of the engine sinking?
A. Going—no sir, did not.
Q. Jerking or jarring?
A. No sir.

Q. When it stopped what did you do?
A. Got down on the ground and went to the injured person.
Q. What did you do with him?
A. Between the three of us we put him on the pilot and took him back down to the depot.
Q. Then what did you do?
A. Then I stayed with the engine, and the rest of the boys
188 took him over to the hospital, or some place, I don't know where.
Q. You go on with your engine?
A. Yes sir.
Q. To where?
A. Winslow, Arizona.
Q. Who was your crew from there on?
A. Mr. Cain, Conductor, and the hind brakeman, whose name was Robbins.
Q. And the engineer?
A. Charles Daze.
Q. He is here?
A. Yes sir.
Q. While you were fireman on this engine before and after this time, did you meet with any accident of any kind by reason of the condition of the pilot?
A. No sir.

Cross-examination:

Q. Mr. Lancaster, after the accident occurred, you boys put Mr. Sowers on the engine and backed up to the depot, and let him off and then when they returned from the hospital you all went on your run out, and picked up your train at the West end of the yards and went on to Winslow?
A. Picked up the train at the station we call——
Q. This station called —— is about four or five miles West of Gallup?
A. Four.
Q. You remember what time you got started out with that train after you picked it up?
A. Well, we must have been in the yards at least an hour after the brakeman was injured before we got another man to take his place.
Q. What time did you start out?
A. Must have been as late as two o'clock anyhow.
Q. You started them on your run to Winslow?
A. We took the engine, went to the west yard and met the train there.
Q. You remember what time you got to Winslow?
A. I cannot say, just before noon if I remember right.
Q. After you got to Winslow there was a new pilot put on
189 this engine, was not there?
A. I do not know that, I never fired the engine after that.
Q. You saw it on there?

A. I seen it the next trip and saw there was a different pilot on it.
Q. There was a different pilot on it?
A. Yes sir.
Q. The pilot you had on that night at the time Mr. Sowers was hurt, you know after that time you seen a new pilot on it?
A. The engine had made a round trip, it had been at least two days.
Q. You saw a new pilot on this particular engine?
A. Yes sir.
Q. Now, Mr. Lancaster, in reply to direct question, you say you felt no unusual jarring or anything of that kind, you also said you did not know exactly when it occurred. When he was hurt. Now, what was there first to bring the fact of the accident to your attention?
A. Well, the fact was that the engineer applied his emergency there and made some remark, I ain't sure what he said, but I understood him to say,——

COUNSEL FOR DEFENDANT: The court excluded that from the other witness. We make the same objection now as before, the engineer is here, because the answer will be—we understand what the counsel undertakes to show, that the answer will be untrue, not a fact. It is not introduced to contradict any body, apparently. It affects no issue in the case and is wholly irrelevant and immaterial.
COURT: I will overrule the objection.
COUNSEL FOR DEFENDANT: We except.

Q. Now, what did Mr. Daze say at the time he applied this air and stopped the engine?
A. Well, I understood him to say—he used some byword—By George or something like that, I believe we are off the track and the——
Q. In what distance did he stop the engine after he made that remark?
190 A. I was not looking out, I cannot tell how far he went afterwards, I judge after he applied the air he did not go very far.
Q. How far in your opinion—a light engine—can stop?
A. Can be stopped almost instantly with a light engine, the speed we were going.
Q. How fast were you going?
A. Three or four miles an hour.
Q. Stop almost instantly?
A. Ten or twelve feet anyhow.
Q. He applied the air, and made this remark?
A. Yes sir.
Q. Now, Mr. Sowers,—you say you did not see the portion of the cow-catcher Mr. Sowers was standing — at the time of the accident?
A. No sir, I did not see him.
Q. How long — you been engaged in railroad and firing, Mr. Lancaster?
A. Ever since January, 1903.

Q. In speaking of pilot and cow-catcher, are they not the same?
A. Yes sir. Back east we call it cow-catcher. In the west call it pilot.

Redirect examination.

Q. Mr. Lancaster, your engine was not off the track, was it?
A. No sir.
Q. Any part of the engine off the track?
A. No sir.

Mr. GEORGE A. SOWERS, plaintiff, being recalled, testified as follows:

Q. Mr. Sowers, I will ask you if you know the length of that rail from the frog on track number five, east rail, to where the joint is of the lighter rail?
A. Yes sir.
Q. How long is that?
A. Five feet and ten inches.
Q. How do you know that?
A. I know it from measurement I taken from it.
191 Q. Measured that, did you?
A. Yes sir.
Q. Cannot be mistaken about that?
A. No sir, I cannot be mistaken about that. I forgotten I had my measurement with it, I knew it was between five and six feet. I know now five feet and ten inches from the measurement I taken of it there last summer.
Q. Now, Mr. Sowers, you heard the testimony of Mr. Daze in reference to the pilot. With reference to the pilot—state if you know, as a fact, that the slat of the pilot—two slats of the pilot was beveled at all?
A. Yes sir, I do.
Q. When did you notice that?
A. I noticed that when I got on the pilot.
Q. When else did you notice it?
A. I noticed it after the pilot was broke, there were some remarks,——
Q. Don't tell any remarks. How far is it from the end of that steel rail to the wing of the frog?
A. It is not over 18 inches, don't know the exact distance of that.

Cross-examination:

Q. What is 18 inches?
A. Foot and a half.
Q. What is it you say is 18 inches?
A. From the point of that steel rail to the wing of the frog. That is from the nearest joint there.
Q. This picture shows two pieces there, point of the rail and this joint, difference in the size, there,——
A. How is that?

Q. The picture shows two pieces of rail there; that which makes the point you say is 18 inches, that right?

A. From the first joint there.

Q. Then there is an independent piece of rail in there, how long is that?

A. That independent piece of rail?

Q. Yes sir.

A. Five feet and ten inches.

192 Q. Five feet and ten inches. You heard Mr. Stormburg say that that piece of rail is 12 feet, didn't you?

A. I heard him say that.

Q. You heard him say that that piece of rail that it tied on by a band there as part of the track, this 65 pound rail, is 12 feet in length?

A. I heard him say that.

Q. You say that is not so?

A. I say that piece of rail in there is five feet and ten inches.

Q. When did you measure it?

A. I measured it on the 22nd day of August.

Q. Let's see that paper?

A. Come over here and I will show it to you, there is what I made them on, there are the marks. Here is that first piece of rail we are speaking about, from this joint to this point here,—here is what I mean—from this joint here to that joint is five feet and ten inches.

COUNSEL FOR PLAINTIFF: What is this here?

A. That is the next joint.

Q. How far is that?

A. Five feet and ten inches.

Q. Then you say to there how far?

A. To the other?

Q. Yes sir.

A. It is not over 18 inches.

Q. How do you know?

A. That is from my memory about that.

Q. Why didn't you be as careful about measuring that?

A. This piece of rail in there we are talking about was lying right off here—that piece of rail I wanted to get the measurement of.

Q. Why didn't you measure the distance of this piece back to the point?

A. Didn't want it, I guess.

Q. That is part of that rail?

A. I wanted to find out the length of that short piece in there.

Q. Why did you want to do that?

A. Because I wanted to know.

193 Q. Why did you want to know?

A. Curiosity, I guess,—wanted to know how long that rail way—had been there looking the track over, figuring it out.

Q. You made that on that date?

A. I had walked up there.

Q. Nobody there for company?

A. No sir.
Q. You did not notify the section foreman that you were going there to make the measurement?
A. No sir.
Q. Did not notify anybody?
A. Did not notify anybody, went down there alone.
Q. In June?
A. In August.
Q. In August?
A. Yes sir.
Q. After the picture was taken or before?
A. After the picture was taken.

COUNSEL FOR PLAINTIFF: We offer the picture in evidence now.
COUNSEL FOR DEFENDANT: We make the same objection to the picture that we made before.
COUNSEL FOR PLAINTIFF: We do not offer the endorsement.
COUNSEL FOR DEFENDANT: We do not object to the picture now.

COUNSEL FOR DEFENDANT: It is admitted, if the court please, that the common law is in force in the Territory of New Mexico, and that this accident happened in the Territory of New Mexico.

If the Court please we offer Chapter 23, "An Act Establishing the Law and Procedure in Certain Cases. Passed March 11th, 1903." which is as follows:

"Whereas, it has become customary for persons claiming damages for personal injuries received in this territory to institute and
194 maintain suits for the recovery thereof in other states and territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the courts thereof.

Therefore, be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this territory who is authorized to administer oaths in which the affiant shall state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries in so far as the same may be known to affiant, the way or manner in which such injuries were caused in so far as the affiant has any knowledge thereof; and the names and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such time be known to affiant, and unless the person so claiming such damages shall also

commence an action to recover the same within one year after such injuries occur, in the district court of this territory in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business, and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided.

195 "SEC. 2. Whenever any person or corporation shall file a petition in the district court of this territory for the county in which said petitioner lives, or, if a corporation, in the district court for the county in which such corporation has its principal place of business, stating in effect that such petitioner is informed and believes that some party named in such petition claims that he is entitled to damages from said petitioner for personal injuries, inflicted in this territory upon the party names in said petition or for personal injuries inflicted upon or death caused to some other person for which such party claims to have a cause of action against said petitioner, and stating as near as may be the general character of such injuries and the manner and date said party claims they were inflicted and the place where he claims they were inflicted as near as petitioner knows or is informed as to such facts, and praying that the said party may be required to appear in said court and file therein a statement of his cause of action in the form of a complaint against said petitioner, summons shall issue out of said court and be served and returnable as other process, commanding and requiring the said party named in said petition to appear in said court and file such statement in the form of a complaint against said petitioner, if he has to make, and upon such complaint being filed by such party as required, the defendant named therein may demur to or answer the same and such further pleading had as the parties may be entitled to or as may be meet and proper as in other cases of a similar character, and from thence forward such further proceedings shall be had in such cause as in other cases and the same shall be determined upon its merits and final judgment subject, however, to appeal or writ of error, shall be rendered therein either for the petitioner named in said complaint or for the adverse party, and if the court finds the petitioner guilty of any of the wrongs, injuries or trespasses complained of against him in said statement, such damages shall be assessed against the said petitioner as the law and the facts may require, in the same manner as though said cause had been instituted by the filing of said statement as a complaint.

"In event said party complained of in said petition, after being duly served with such summons, shall fail or refuse to appear
196 or file his said statement as required herein, judgment shall be rendered by default against him in favor of the petitioner

as in other cases, and thereupon the court shall try and determine the issues raised by such petition including the question as to whether or not the petitioner is liable to said party on account of any of the matters or things stated in said petition in any sum of money whatsoever, and if so, in what amount, and final judgment shall be rendered in accordance with the facts and the law, and such judgment as the court may render shall be final and conclusive upon the question of the liability or non-liability of said petitioner to said party, and of the amount of the liability.

"SEC. 3. It shall be unlawful for any person to institute carry on or maintain any suit for the recovery of any such damages in any other state or territory and upon it being made to appear to the court in which any proceeding has been instituted in this territory as herein provided that any such suit has also been commenced, or is being maintained in any other state or territory, contrary to the intent of this act, it shall be the duty of the court to set down for hearing and try and determine the proceeding so pending in this territory as expeditiously as possible, upon which short notice to the other party thereto or his attorneys as the court may direct; and for the purpose of trying the same said court shall have the power to compel the parties thereto to plead or answer on such short day as it may determine and in event the same is triable by jury it shall be the duty of the court, upon motion, to change the venue thereof to such county in said district as in the opinion of the court will afford an opportunity for the most speedy hearing; but in event such action is not triable by jury, then the court shall immediately proceed to try and determine the same, giving such reasonable notice as it may determine, to the parties or their attorneys at any place in the territory which the court may designate, and witnesses may be compelled by subpœna to attend such place personally, from any part of the territory, and testify, as at present, at such time and place. The institution of any such suit in any other state or territory shall be construed by the court as a waiver upon the part of the party so instituting the same of the right of trial by jury in the case pending in the courts of this territory.

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SEC. 4. Whenever it shall be made to appear to the district court of this territory for the county in which petitioner or plaintiff lives, by any petition filed under section 3 hereof, or by a supplemental petition, or by any original complaint filed for that purpose, that petitioner or plaintiff fears or has good reason to fear that any other person is threatening or contemplating instituting suit in some other state or territory to recover damages against petitioner or plaintiff for personal injuries inflicted or death caused in this territory, or that he has already instituted and is then maintaining such a suit, it shall be the duty of the court upon such bond as the court may require being given, to issue its injunction, *pendente lite* restraining such suit in any court sitting in any other state or territory, and, at the final hearing, if such facts are found by the court to be true, the court shall make such injunction perpetual; and at the final hearing in all cases instituted under the provisions of section 3 hereof, the party complained of in the petition shall be perpetually

enjoined from further instituting or maintaining any suit or action to recover damages by reason of any of the matters or things set up in said petition.

"SEC. 5. This act shall not apply to cases in which the person or corporation against whom damages for personal injuries are claimed can not be duly served with process in this territory.

"SEC. 6. Nothing herein contained shall be construed as in any way preventing any one in this territory claiming to have a right of action for any such damages, from compromising such claim.

SEC. 7. All acts and parts of acts and laws in conflict with this act are hereby repealed and this act shall be in effect from and after its passage."

It is agreed by the parties to the above entitled and numbered cause, that the foregoing is a correct statement of all the facts admitted and proved in evidence on the trial of the cause.

Witness our hands this the 15 day of January, A. D., 1906.

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PATTERSON & WALLACE,
Attorney- for Plaintiff.
TURNEY & BURGES,
Attorney- for Defendants.

The above and foregoing statement of facts having been submitted to me, has been examined by me, and I approve the same as correct and order it to be filed by the clerk in the record as the statement of facts in the above entitled and numbered cause this the 15th day of January, A. D., 1906.

JAMES R. HARPER,
Judge Presiding.

I, W. B. Bull, official stenographer of the 41st Judicial District of Texas hereby certify that the above and foregoing 200 pages contain a true and correct transcription of my notes in said case.

Witness my hand on this the 15th day of January, A. D., 1906.

W. B. BULL,
Official Stenographer, 41st Judicial District of Texas.

Filed this 15th day of Jan'y, A. D. 1906.

I. ALDERETE,
Clerk District Court, El Paso Co., Texas
E. B. McCLINTOCK, *Deputy.*

Endorsed: 3596. Original. George A. Sowers *vs.* Atchison, Topeka & Santa Fe Railway Company. Filed in the Court of Civil Appeals at San Antonio, Texas, Apr. 2, 1906. H. E. Hildebrand, Clerk.

199 *Opinion.*

No. 3596.

ATCHISON, TOPEKA & SANTA FE RY. CO., Appellant,
vs.
GEORGE A. SOWERS, Appellee.

From El Paso County.

This is a suit to recover damages arising from personal injuries inflicted on appellee, in New Mexico, through the negligence of appellant. Appellant set up in its answer a statute of New Mexico providing among other things that suits for personal injuries received in that territory shall not be prosecuted in any but the territorial courts. The court sustained exceptions as to that part of the answer setting up the provision as to such cases being prosecuted in territorial courts alone. A trial by jury resulted in a verdict and judgment for appellee in the sum of five thousand dollars.

We conclude that the facts show that appellant was guilty of negligence in having its track in such condition that the foot of appellee who was standing on the front of the pilot was caught between the pilot and a frog or guard rail and so crushed that amputation became necessary and was performed. Appellee was an employé of appellant and it was in discharge of his duty as head brakeman and was riding in the customary way on the pilot of the engine to a place where some switching was to be done. We find that he was not guilty of contributory negligence and that he was injured in the sum found by the jury through the negligence of appellant.

The first assignment of error complains of the admission of testimony tending to show that it was a custom of the employés of appellant to ride on the pilots of its engines while engaged in switching in the yards. The objection urged to the testimony, when appellee was offered to establish it, was that if "other people may have habitually ridden in dangerous places, it would not authorize him in doing so." The objection was reiterated when each of the other five witnesses testified on the subject. The objections are amplified in the assignment so as to include the lack of knowledge of the existence of such custom on the part of appellant and that it "was wholly irrelevant and immaterial and hearsay." The statement is so meagre as to be almost useless and in at least two instances the references to the pages of the record where the bills of exceptions were written were incorrect. The rules as to statements under propositions must be complied with if parties desire a consideration of their as-
200 signments of error. If under the the old system of preparing statements of facts full statements of the evidence touching on assignments were required, how much more are they needed when for a statement of facts appellate courts, under the statute, are furnished with a mixture of all kinds and conditions of questions and

answers from which must be winnowed the pertinent facts. The assistance of the attorneys must be required to aid the courts in arriving at the facts under the present cumbersome system. While the assignment of error is not followed by a full statement, as it should be, it can be said that the questions raised by it have been decided adversely to appellant. Railway *v.* Beane, (Tex. Civ. App.) 50 S. W. 411; Railway *v.* Waller, 27 Civ. App. 44, 65 S. W. 210. These cases also dispose of the second, sixth and seventh assignments of error which practically present the same questions as are found in the first.

Railroad companies are charged with knowledge of the manner in which their employés customarily perform their labors, and have so performed them for years, and the burden does not rest upon a plaintiff to prove that some officer of theirs knew of such custom. If appellant did not know how its work was being performed it ought to have known it.

The court did not err in refusing to charge the jury: "At the request of the defendant you are hereby instructed that if you believe from the evidence before you, that a position on the pilot of an engine was one of danger, and particularly in event of a collision with any obstruction of any kind on the track, and that plaintiff's presence on the pilot contributed approximately to the injuries he sustained, then he cannot recover herein, and your verdict must be for the defendant." The charge assumed that if it was dangerous to ride on a pilot and riding there contributed to the injuries, that appellee was guilty of negligence and appellant was not. Those were questions to be determined by the jury, and not a matter of law to be determined by the court. The court gave a charge covering the case if the jury found that it was contributory negligence for appellee to ride on the pilot of the engine.

A portion of the seventh paragraph of the charge of the court is segregated from the other parts and criticized, as assuming certain facts and as being upon the weight of the evidence. The criticism has no basis whatever when the whole of the paragraph is read and construed together. Every fact is left to be found by the jury as is apparent from a reading of the charge which is as follows:

"If therefore you believe and find from the evidence and a preponderance thereof, that the defendant, the Atchison, Topeka & Santa Fe Railway Company permitted the road-bed, track
201 or side-track over which the engine upon which plaintiff, George A. Sowers, was riding, to become soft, and out of repair, so that as a consequence (if you so find) the point of the rail dropped so low that the engine in passing over it sagged or dropped down so low that the pilot thereof came in contact with or struck a frog; that such acts, if any, constituted negligence upon the part of the defendant railway company; that the pilot striking the said frog as aforesaid, if you have found from the evidence that it did so strike, caught plaintiff's foot, as charged in plaintiff's petition, that plaintiff thereby suffered the injuries alleged by him; that such acts of the defendant, if any, was the proximate cause of such

injury, if any, suffered by plaintiff; and you further believe that the plaintiff was not guilty of contributory negligence, and that he did not assume the risks, then you will find for the plaintiff, but unless you do so believe you will find for the defendant."

The evidence did not show beyond controversy that appellee was guilty of contributory negligence, nor was he charged with it as a matter of law from riding on the pilot, and the court very properly refused the special instructions that are made the subject of the eighth and ninth assignments of error. It would have been a gross invasion of the prerogatives of the jury for the court to have entertained the special charges.

The injuries were inflicted on appellee in the Territory of New Mexico, and appellant asked an instruction that the common law prevailed and that if the condition of the track arose from the negligence of a fellow servant appellee could not recover. That charge is fully met by the simple statement that there was no testimony tending to show that the defects in the track resulted from the negligence of any one placed there to repair and keep it in repair, but from the negligence of appellant in not having it repaired. The court authorized a recovery on the theory of the defective track and that alone. Under the common law the track repairer was not a fellow servant with the brakeman or switchman.

The provisions of a law of the Territory of New Mexico were pleaded by appellant and the court sustained exceptions to those portions that set up a requirement of that law that provided that suits of this character can be instituted and maintained in the courts of that Territory alone. Some of the provisions of that law were carefully considered by this court in the case of Buttron *v.* Railway, 93 S. W. 676, but the question now presented was not considered in that case.

It may be that the law-making power of a state may have the power to declare that there shall be no right of action for damages arising from personal injuries inflicted through the negli-
202 gence of persons or corporations within its bounds, and however unjust and iniquitous such laws might be, they should be recognized and respected by the courts of other states. A state would have the authority to pass laws compelling its injured citizens to fully disclose their evidence and line of complaint to the negligent party, and to give notice within a certain time of claims for damages, and sister states would recognize the validity of such laws. The section of the law under consideration, however, goes farther than the extreme measures indicated, and attempts not only to prohibit its citizens but all parties, who are so unfortunate as to be injured within its territorial limits, from exercising the right, accorded in England, the States of the American Union, and other civilized countries, of instituting such actions wherever the guilty party may have his or its domicile.

We have seen no case involving the issue arising in this case, and this results from the fact that no other state or country perhaps has ever attempted such radical legislation. It was formerly doubted that a State could enjoin its citizens from instituting suits in other states, and while it is now held that such injunctions are maintain-

able, such right is limited to cases where suits are inequitable and unjust and would defeat the operation of the laws of the state from which the injunction is issued. Cole *v.* Cunningham, 133 U. S. 107; Wilson *v.* Joseph, (Ind.) 8 N. E. 616; Sandage *v.* Studebaker, (Ind.) 41 N. E. 380; Miller *v.* Gittings, (Md.) 37 Atl. 372; Hawkins *v.* Ireland, (Minn.) 67 N. W. 73; Huettinger *v.* Huettinger, (N. J. Eq.) 43 Atl. 574. In all of those cases and other- on the subject injunctions have been issued only when the parties were citizens of the state and to restrain unjust actions instituted in other states to render nugatory the laws of the state where the parties reside. By the enactment of the law in question, however, the Territory of New Mexico has issued a legislative injunction against any one injured by the negligence of another within its bounds, regardless of his place of domicile or the equities that may be involved. There is no law or precedent for it and it is an assumption of authority that will not be tolerated in the courts of any state.

Under the decisions, hereinbefore cited, it would seem appellant would not have been entitled to an injunction to restrain a citizen of New Mexico from instituting and maintaining a suit for damages in the Courts of Texas, because it could not have been shown that there was any attempt to nullify or evade any provision of the laws of New Mexico, and certainly it did not have the right to an injunction against a citizen of Arizona restraining him from choosing the forum in which he desired to have his rights adjudicated. What could not be done in any court of equity is sought to be accomplished by a blanket legislative injunction.

203 The State of Texas, is bound under Sec. 1, Article IV, of the Constitution of the United States, to give full faith and credit to the public acts, records, and judicial proceedings of every other state, but it is not required to recognize a statute of any state that seeks to fix the jurisdiction of its courts, and prevent the citizens of other states from using its courts, if they so desire, in the enforcement of their rights. The jurisdiction of our courts must and will be prescribed by the Constitutional and legislative authority of our State, and not by that of any other state. A law attempting such interference is null and void and as such does not come within the constitutional provision, aforementioned. There is nothing in the contention that a void statute is binding on the courts of Texas until the territorial courts declare the law invalid. In the very nature of things the question will probably never be presented to the territorial courts and in the next place their decision could not give vitality to a void statute respecting the jurisdiction of the courts of this state. We do not question the authority of the laws of New Mexico so far as they apply to its own affairs, but we repudiate them when they attempt to regulate the affairs of other states.

The right of injured parties to recover damages from the negligent inflicter of the injuries is recognized in New Mexico, although recognition carries with it burdensome and vexatious conditions, of which, however, if its citizenship is willing to endure them, no one is in a position to complain. But the citizens of other states cannot be forced

into its courts by a legislative provision that such suits can be instituted and prosecuted in the courts of no other state.

There is no error disclosed by the record and the judgment will be affirmed.

(Signed) W. S. FLY,
Associate Justice.

Endorsed: No. 3596. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. Atchison, Topeka & Santa Fe Ry. Co., Appellant, *vs.* George A. Sowers, Appellee. From El Paso County. Opinion by W. S. Fly, Associate Justice. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 19, 1906. H. E. Hildebrand, Clerk. Filed in Supreme Court Feb. 13, 1907. F. T. Connerly, Clerk.

204 *Judgment of the Court of Civil Appeals.*

WEDNESDAY, *December* 19, *A. D.* 1906.

No. 3596.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., Appellant,
vs.
GEO. A. SOWERS, Appellee.

Appeal from El Paso County.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee, George A. Sowers, do have and recover of and from the appellant, Atchison, Topeka & Santa Fe Railway Company, and its sureties, A. Kohlberg and J. J. Mundy, the amount adjudged by the Court below, and all costs in this behalf incurred, and this decision be certified below for observance.

Motion for Rehearing.

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., Appellant,
vs.
GEORGE A. SOWERS, Appellee.

Motion for Rehearing.

Now comes the Atchison, Topeka & Santa Fe Railway Company, appellant in the above numbered and entitled cause and respectfully

moves the Court to set aside the judgment heretofore rendered in this cause and to grant it a rehearing herein, and for grounds of this motion respectfully shows to the court the following:

1.

The Court erred in overruling and in not sustaining appellant's first assignment of error and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

"Court erred in admitting, over the objection of the de-
205 fendant, the testimony of plaintiff, Daze, Stromburg, Cain, Lancaster and Campbell, witnesses for plaintiff, to effect that said witnesses, and each of them, had heard of other employés of the defendant riding on the pilot of defendant's engines; that said witnesses had seen other employés riding on the pilots of defendant's engines; that they themselves had ridden on the pilots of the defendant's engines, and that it was the custom of the employés to ride on the pilots of the defendant's engines. All of which said testimony, so introduced over the objection of the defendant, was inadmissible because no habit or custom on the part of the employés to ride in a place of danger would bind the defendant, and, further, because it was not shown that the defendant ever knew, or that any officer of the defendant ever knew, of such custom, or that the defendant's company sanctioned such custom, and because such evidence was wholly irrelevant and immaterial, and hearsay, all of which is shown by objections and exceptions set forth in the records of the stenographer in this cause.

2.

The Court erred in overruling and in not sustaining appellant's second assignment of error and all of the propositions thereunder, which said assignment of error is as follows, to-wit:—

The Court erred in admitting, over the objection of defendant, the depositions read in evidence, to-wit, the eighth, ninth, tenth, eleventh and twelfth answers to the depositions of the witnesses Bedow, Howard and Daze, in substance and to the effect that it was the custom of employés of the defendant to ride on the pilots of engines, and that upon other roads the employés rode upon the pilots of the engines, and that other employés of the defendant besides the witnesses rode upon the pilots of the engines. The admission of this testimony was error, because no such acts of the employés of this company could bind this defendant, and especially could not the acts of the employés of other roads bind this company, and because said testimony, and all of same, was irrelevant and immaterial, hearsay, and tended to prejudice the rights of the defendant and show a license in the plaintiff to occupy a place of danger on this particular engine in question, and to establish a custom when no knowledge of such custom, and no knowl-
206 edge of the acts of those so acting, has been shown or have ever been brought to the knowledge of the company or to the managing officers thereof. All of which testimony and objec-

tions, and exceptions thereto, are fully shown in the stenographer's statement of facts of record in this case.

Propositions under this assignment same as under first assignment.

3.

The Court erred, in overruling and in not sustaining appellant's third assignment of error and all the propositions thereunder, which said assignment of error is as follows, to-wit:

The court erred in refusing to give defendant's special charge No. 1, as follows: "You are instructed that the undisputed evidence in this cause shows that the injuries of the plaintiff were the natural and probable result of the risk assumed by him in accepting employment and undertaking the discharge of the duties assumed by him, and therefore he cannot recover herein, and you will return a verdict in favor of the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because the same was called for by the evidence introduced herein, and, therefore, said special charge should have been given.

First Additional Proposition Under This Assignment.

In the absence of evidence to the effect that some officer of the company having authority over plaintiff knew of his practice, or of the practice of anyone else, riding on the pilots of its engines, the railway company would not be responsible for an accident resulting from such habit of practice.

4.

The Court erred in overruling and in not sustaining appellant's fourth assignment of error and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

The Court erred in refusing to give defendant's special charge No. 6, as follows: "At the request of the defendant you are hereby instructed that if you believe from the evidence before you, that a position on the pilot of an engine was one of danger, and particularly in the event of a collision with any obstruction of any kind
207 on the track, and that plaintiff's presence on the pilot contributed approximately to the injuries he sustained, then he cannot recover herein, and your verdict must be for the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

5.

The Court erred in overruling and in not sustaining appellant's fifth assignment of error and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

The Court erred in the seventh paragraph of its main charge, in which the jury are instructed as follows: "If, therefore, you believe and find from the evidence and a preponderance thereof that the de-

fendant, the Atchison, Topeka & Santa Fe Railway Company, permitted the roadbed, track or sidetrack over which the engine upon which plaintiff George A. Sowers was riding to become soft and out of repair, so that as a consequence (if you so find), the point of the rail dropped so low that the pilot thereof came in contact with or struck a frog; that such facts, if any, constituted negligence upon the part of the defendant railway company."

Because said charge of the court sums up a certain state of facts, conditions and happenings, and tells the jury the same constitute negligence on the part of the defendant railway company. Said charge is in error, because the same is a charge upon the weight of the evidence, and further, because same assumes the existence of facts which do not exist, and because the said charge finds the facts which the jury, and the jury alone, should find to exist, and for said reason the entire seventh paragraph is error, and should not have been given.

6.

The court erred in overruling and in not sustaining appellant's sixth assignment of error and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

The Court erred in refusing to give defendant's special charge No. 5, as follows: "At the request of the defendant, you are hereby instructed that no custom or usage, should you believe from
208 the evidence one has been shown, can ever be relied upon to excuse an act in itself negligent, and if you believe from the testimony that the act of riding on the pilot of a locomotive proximately contributed to plaintiff's injury, you will find for the defendant, as such act of riding on the pilot of an engine is negligence as a matter of law."

Because same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Additional proposition under this assignment same as those stated under the first assignment.

7.

The Court erred in overruling and in not sustaining appellant's seventh assignment of error, which said assignment of error is as follows, to-wit:

The court erred in refusing to give defendant's special charge No. 3 as follows: "At the request of the defendant you are instructed that there is no evidence in this cause to show that any officer of the defendant company, or anyone having authority over the plaintiff to prevent same, knew of his practice, if any such practice existed, or the practice of anyone else, if any such practice existed, of riding on the pilots of its engines under the circumstances under which the plaintiff was injured in this case, and therefore you will not consider the evidence introduced on the subject of such practice of the employés of the defendant, and such practice or custom would not relieve the plaintiff from the consequences of his negligence in riding

in a place of danger, if you believe from the evidence herein that it is negligence to ride at such place, as negligence has heretofore been defined to you."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

8.

209 The Court erred in overruling and in not sustaining appellant's eighth assignment of error, which said assignment of error is as follows, to-wit:

The Court erred in refusing to give defendant's special charge No. 2, as follows: "At the request of the defendant you are instructed that the undisputed evidence in this cause shows the plaintiff was guilty of such contributory negligence as to prevent his recovering and you will return a verdict for the defendant."

Because same was the law in this case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

9.

The Court erred in overruling and in not sustaining appellant's ninth assignment of error, which said assignment of error is as follows, to wit:

The court erred in refusing to give defendant's special charge No. 4, as follows: "At the request of the defendant you are hereby instructed that if you believe from the evidence that a position on the pilot of the engine was one of danger, and that this was open to the knowledge of the plaintiff, then you will return a verdict in favor of the defendant, whether you find the agents or employés of the defendant permitted plaintiff to ride on the pilot or not."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

10.

The Court erred in overruling and in not sustaining appellant"s tenth assignment of error, and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

The court erred in refusing to give defendant's special charge No. —, as follows: "At the request of the defendant, I charge you that as the accident to the plaintiff occurred in the Territory of New Mexico, that therefore the common law, as understood, is the law governing this action as to fellow-servants, and that under such common law the defendant would not be liable if the injury to
210 the plaintiff was caused by the negligence of a fellow-servant.

A fellow-servant of plaintiff is a servant of the defendant who, at the time of the injury, was a colaborer with plaintiff on the engine, or those persons whose duty it was to keep the track No. 5 in

repair. Therefore, if you believe that any such fellow-servant of the plaintiff was guilty of negligence, if any, and that such negligence contributed to cause, or did cause, the injury to plaintiff, that then the defendant would not be liable therefor, and if you further find that such injury would not have occurred except for such negligence of such fellow-servants, that then your verdict should be for defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

11.

The Court erred in overruling and in not sustaining appellant's eleventh assignment of error, which said assignment of error is as follows, to-wit:

The Court erred in refusing to give defendant's special charge No. 8, as follows: "At the request of the defendant you are charged, That if you believe the plaintiff, at the time of his injury, was standing with his right foot dangling in front of the lower slat of the engine pilot, and not upon said slat, and that had plaintiff not so let his foot dangle in front of said slat, he would not have been injured, and that so to let his foot dangle was negligence, then your verdict should be for the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

12.

The Court erred in overruling and in not sustaining appellant's twelfth assignment of error, and all of the propositions thereunder, which said assignment of error is as follows, to wit:

The Court erred in refusing to give defendant's special
211 charge No. 7, as follows: "That under the law of the Territory of New Mexico, pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

13.

The Court erred in overruling and in not sustaining appellant's thirteenth assignment of error, and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

The court erred in sustaining the demurrer of the plaintiff to defendant's plea, set forth in its amended answer, in which the laws of the Territory of New Mexico were pleaded as a defense to this action, when it was shown and admitted that no such suit had been

brought by the plaintiff in the Territory of New Mexico, as provided by the laws of said Territory, said laws being fully pleaded and introduced in evidence.

14.

The Court erred in overruling and in not sustaining appellant's fourteenth assignment of error, and all of the propositions thereunder, which said assignment of error is as follows, to-wit:

The Court erred in sustaining plaintiff's exception to the defendant's answer, which exception was filed in this case on the 11th day of December, 1905, for the reason that the defendant company did not own any line of railway in the State of Texas; that it did own and operate a line of railway in the Territory of New Mexico; that it did have agents in the said Territory of New Mexico upon whom service may be had; that it was shown that the courts held regular sessions in the said Territory of New Mexico, and in the county where said accident occurred, which said courts had jurisdiction of the said matters and things involved in this controversy; that it had not been shown and was not pleaded that the plaintiff ever brought his suit in the Territory of New Mexico within the
212 time fixed by the act pleaded by defendant, or within any other time; because the act of the Legislature pleaded by the defendant was not a local or special law, but a general law; that the said act so pleaded was not contrary to the organic law of said Territory, because said act so pleaded by the defendant was not contrary to the seventeenth provision of the organic law of the Territory of New Mexico; because said act so pleaded was not in violation of the fifth amendment of the Constitution of the United States, or any other amendment; because said act of the Legislature was not void, was not class legislation, but was and had been held to be such legislation as the Legislature of the Territory of New Mexico might have enacted; because none of the reasons pleaded by the plaintiff in said exception, or any subdivision of said exception, were valid, nor should said exception, or any subdivision thereof, have been sustained.

Wherefore, the court erred in sustaining the plaintiff's said exception to the defendant's answer setting forth the law of New Mexico as pleaded in said answer.

Wherefore by reason of the foregoing errors committed by the court, appellant prays that judgment heretofore rendered may be set aside and held for naught, and that appellant may be granted a rehearing of this cause and that upon such rehearing, for the errors indicated, the judgment of the trial court may be reversed and the cause remanded. Appellant would respectfully represent to the court that Patterson & Wallace are attorneys of record for the appellee, George A. Sowers, and that they reside in the County of El Paso, State of Texas.

Wherefore, appellant prays for all due and legal service of this motion in accordance with the law and that the relief above prayed for may be granted, together with general relief.

Respectfully submitted,

J. W. TERRY,
A. H. CULWELL,
Attorneys for Appellant.

Endorsed: No. 3596. Mo. 4094. A. T. & S. F. Ry. Co., Appellant, Geo. A. Sowers, Appellee. Motion for Rehearing. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 26, 1906. J. Murray, Clerk. Overruled Jan. 16, 1907. Filed in Supreme Court, Feb. 13, 1907. F. T. Connerly, Clerk.

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Order of Court on Motion for Rehearing.

WEDNESDAY, *January* 16, *A. D.* 1907.

No. 3596.

A., T. & S. F. RY. CO., Appellant,
vs.
GEO. A. SOWERS, Appellee.

Appeal from El Paso County.

The motion of appellant for a rehearing, filed Dec. 26th, 1906, coming on to be heard, and the Court having duly considered the same; it is ordered that said motion be and it is hereby overruled; and it is further ordered that appellant, Atchison, Topeka & Santa Fe Railway Company, and its sureties, A. Kohlberg and J. J. Mundy, pay all costs of this motion.

Petition for Writ of Error.

In the Supreme Court of Texas.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE A. SOWERS, Defendant in Error.

Petition for Writ of Error.

To the Honorable The Supreme Court of Texas:

The Atchison, Topeka & Santa Fe Railway Company respectfully petitions the Court to grant a writ of error directed to the Judges of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, sitting at San Antonio, to review a certain judgment rendered in that court on December 19, 1906, whereby the judgment of the District Court of El Paso County against your petitioner in favor of the defendant in error for the sum of Five Thousand Dollars ($5000.00) entered on the fifteenth day of December, 1905, was affirmed, and in which case your petitioner's motion for a rehearing in the Court of Civil Appeals was overruled on the sixteenth day of January, 1907. This application is presented and based upon the same assignments which were presented in the Court of Civil Appeals, but will not be here presented in the same order that same are stated in appellant's brief.

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First Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and not sustaining plaintiff in error's twelfth assignment of error in that court, which was as follows:

The court erred in refusing to give defendant's special charge No. 7, as follows: "That, under the law of the Territory of New Mexico, pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

First Additional Proposition Under This Assignment.

Under the laws and Constitution of the United States, it is the duty of the courts of one State to give full faith and credit to the public acts, records and judicial proceedings of every other State or Territory, and it having been shown to the court that there was a public act in the Territory of New Mexico controlling and governing suits and actions of this character, it was the duty of the court trying this case to give full force, faith and credit to the same, and to enforce the provisions thereof.

Authorities.

Chicago, Rock Island Pacific Ry. Co. *vs.* Thompson, 16th T. C. R. 979.
Article 4, Section 1, Constitution of the United States.
Revised Statutes of the United States, Section 905.
Glenn *vs.* Garth, 147 U. S. 367.
Buttron *vs.* El Paso & Northeastern Ry. Co. 15 T. C. R., 339.
215 Allen *vs.* Allegheny Co., 196 U. S., 311.
C. & A. R. R. *vs.* Wiggins Ferry Co., 119 U. S., 622.
B. & P. R. R. *vs.* Hopkins, 130 U. S. 211.
B. & O. R. R. *vs.* Baugh, 149 U. S., 372.

Second Additional Proposition under This Assignment.

The several States and Territories have the undoubted right to regulate by law the relations between employers and employés within their borders, and to fix by legislative enactment the liabilities of the former for the acts and negligence of the latter, and the Territory of New Mexico had the right to fix by legislative enactment the rights and duties of employer to employé, and *vice versa*, and to

provide the mode of procedure for the enforcement of such rights, and the action of the Legislature of the Territory of New Mexico in this regard cannot be nullified by the courts of another State.

Authorities.

Southern Pacific Co. *vs.* Schoer, 114 Federal Reporter, 467, and authorities there cited.

Third Additional Proposition under This Assignment.

The courts of one State may not pass upon the validity of a statute of another State or Territory, but at best they are only permitted to place a construction. Such courts are not authorized to declare such statutes null and void, unless by doing so they are following the construction and precedent established by the court of last resort in the State or Territory where the legislation was enacted, and in this case, it not appearing that the court of last resort in the Territory of New Mexico had declared the statute in question null and void, the courts in Texas have no rights to so do, but such latter courts must assume that the legislation in question is regular and valid.

Authorities.

Johnson *vs.* N. Y. Life Ins. Co., 235 C. R., 194.
Glenn *vs.* Garth, 147 U. S., 369, and authorities there cited.
Eastern B. & L. *vs.* Williamson, 235 C. R. 537.
Mexican National Ry. Co. *vs.* Jackson, 89 Texas, 107.
B. & O. Ry. *vs.* Hopkins, 130 U. S. 210.
Ry. Co. *vs.* McCormick, 71 Texas, 660.
Ry. Co. *vs.* Richards, 68 Texas, 375.
Thomas *vs.* Western Union Telegraph Co., second T. C. R., 133.

216 *Statement Under All of Above Propositions.*

Special charge No. 7, set out in this assignment, was asked and refused. (Tr. page 27, line 8 to line 20.) On the trial of this case the plaintiff offered in evidence the written notice which he had served upon plaintiff in error's local agent at Gallup, N. M., which was to the effect that he had been injured while working as a brakeman at Gallup, N. M., on April 30, 1905, and in which he gave the details of the accident and names of the witnesses, as required by the laws of New Mexico. (Sten. Record, page 108, line 17 to page 109, line 30.) It was also shown by the plaintiff on the trial of this case that the plaintiff in error had an agent at Gallup, in New Mexico, at the time of this accident, and that such agent received this notice. (Sten. Record, page 110, line 6 to line 14.) It was admitted, on the trial of this case that the common law was in force in the territory of New Mexico, and that this accident happened in that territory. (Sten. Record, page 195, line 1 to line 3.)

The plaintiff in error offered in evidence chapter 23, laws of New Mexico, passed March 11, 1903, the same being an act establishing the law and procedure in certain cases and which act is as follows:

"Whereas it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the courts thereof.

"Therefore, be it enacted by the Legislative Assembly of the Territory of New Mexico:

"SECTION 1. Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this Territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and
217 at least thirty days before commencing suit to recover judgment thereof, and affidavit which shall be made before some officer within this territory who is authorized to administer oaths in which the affiant, shall state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries in so far as the same may be known to affiant, the way or manner in which such injuries were caused in so far as the affiant has any knowledge thereof, and the names and addresses of all witnesses to the happening of the facts of any part thereof causing such injuries as may at such time be known to affiant, and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the district court of this territory in and for the county in which such injuries occur, or in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business; and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided.

"SEC. 2. Whenever any person or corporation shall file a petition in the district court of this territory for the country in which said petitioner lives, or, if a corporation, in the district court for the county in which such corporation has its principal place of business, stating in effect that such petitioner is informed and believes that some party named in said petition claims that he is entitled to damages from said petitioner for personal injuries, inflicted in this territory upon the party named in said petition or for personal injuries in-

flicted in this territory upon the party named in said petition or for personal injuries inflicted upon or death caused to some other person for which such party claims to have a cause of action against said petitioner, and stating as near as may be the general
218 character of such injuries, and the manner and the date said party claims they were inflicted, and the place where he claims they were inflicted as near as petitioner knows or is informed as to such facts, and praying that the said party may be required to appear in said court and file therein a statement of his cause of action in the form of a complaint against said petitioner, summons shall issue out of said court, and be served and returnable as other process, commanding and requiring the said party names in said petition to appear in said court and file such statement in the form of a complaint against said petitioner, if he has to make; and upon such complaint being filed by such party as required, the defendant names therein may demur to, or answer, the same and such further pleading had as the parties may be entitled to, or as may be meet and proper as in other cases of a similar character, and from thence forward such further proceedings shall be had in such cause as in other cases, and the same shall be determined upon its merits, and final judgment, subject, however, to appeal or writ of error, shall be rendered therein either for the petitioner named in said complaint or for the adverse party; and if the court finds the petitioner guilty of any of the wrongs, injuries or trespasses complained of against him in said statement, such damages shall be assessed against the said petitioner as the law and the facts may require, in the same manner as though said cause had been instituted by the filing of said statement as a complaint.

"In event said party complained of in said petition, after being duly served with such summons, shall fail or refuse to appear or file his said statement as required herein, judgment shall be rendered by default against him and in favor of the petitioner as in other cases, and thereupon the court shall try and determine the issues raised by such petition, including the question as to whether or not the petitioner is liable to said party on account of any of the matters or things stated in said petition in any sum of money whatsoever, and, if so, in what amount, and final judgment shall be rendered in accordance with the facts and the law, and such judgment as the court may render shall be final and conclusive upon the question of the liability or non-liability of said petitioner to said party, and of the amount of the liability.

219 "SEC. 3. It shall be unlawful for any person to institute, carry on, or maintain any suit for the recovery of any such damages in any other state or territory, and upon it being made — appear to the court in which any proceeding has been instituted in this territory as herein provided that any such suit has also been commenced, or is being maintained in any other state or territory, contrary to the intent of this act, it shall be the duty of the court to set down for hearing and try and determine the proceeding so pending in this territory as expeditiously as possible, upon such short notice to the other party thereto or his attorneys as the court may

direct; and for the purpose of trying the same, said court shall have the power to compel the parties thereto to plead or answer on such short day as it may determine; and in event the same is triable by jury, it shall be the duty of the court, upon motion, to change the venue thereof to such county in said district as in the opinion of the court, will afford an opportunity for the most speedy hearing; but in event such action is not triable by jury, then the court shall immediately proceed to try and determine the same, giving such reasonable notice as it may determine, to the parties or their attorneys, at any place in the territory which the court may designate, and witnesses may be compelled by subpœna to attend such place personally, from any part of the territory, and testify, as at present, at such time and place. The institution of any such suit in any other state or territory shall be construed by the court as a waiver upon the part of the party so instituting the same of the right of trial by jury in the case pending in the courts of this territory.

"SEC. 4. Whenever it shall be made to appear to the district court of this territory for the county in which petitioner or plaintiff lives, by any petition filed under section three hereof, or by a supplemental petition, or by any original complaint filed for that purpose, that petitioner or plaintiff fears or has good reason to fear that any other person is threatening or contemplating instituting suit in some other state or territory to recover damages against petitioner or plaintiff for personal injuries inflicted, or death caused, in this territory, or that he has already instituted and is then maintaining such a
220 suit, it shall be the duty of the court upon such bond as the court may require being given, to issue its injunction, *pendente lite*, restraining such suit in any court sitting in any other state or territory; and, at the final hearing, if such facts are found by the court to be true, the court shall make such injunction perpetual; and at the final hearing in all cases instituted under the provisions of section three hereof, the party complained of in the petition shall be perpetually enjoined from further instituting or maintaining any suit or action to recover damages by reason of any of the matters or things set up in said petition.

"SEC. 5. This act shall not apply to cases in which the person or corporation against whom damages for personal injuries are claimed can not be duly served with process in this Territory.

"SEC. 6. Nothing herein contained shall be construed as in any way preventing any one in this territory claiming to have a right of action for any such damages, from compromising such claim.

"SEC. 7. All acts and parts of acts and laws in conflict with this act are hereby repealed, and this act shall be in effect from and after its passage." (Sten. Record, page 195, line 4, to page 200, line 5.)

Argument.

Plaintiff in error presents three assignments of error, raising practically, but in various forms, the questions which will be presented at length under this assignment. In order that we may be fully

understood, let us state certain facts appearing in this record and which are admitted.

First. The plaintiff Sowers, at the time of his injury, was a brakeman in the service of the plaintiff in error, performing such services in the Territory of New Mexico.

Second. The injuries herein complained of were received in plaintiff in error's railway yards in Gallup, New Mexico.

Third. At the time of this accident, and at all times since, this railway company had a line of railroad extending into and through Gallup, N. M., and likewise had a local agent at said place upon whom service of process could be had.

Fourth. There were sufficient courts, not only in the
221 County of New Mexico in which Gallup is situated, but in various other counties in that territory having jurisdiction and authority to try all controversies arising out of this accident.

Fifth. The Territory of New Mexico had passed an Act, March 11, 1903, regulating the liability of master and servant, and prescribing the duties each owed to the other in case of contemplated litigation, and this is the act above set out.

Sixth. While Sowers served the notice upon the agent of the railway company required in section one of that act, and within the time required, it is admitted that he did not, and never has, filed suit upon this cause of action and against this plaintiff in error at any place within the Territory of New Mexico, and that he did nothing as required by this legislative act except to serve this notice, and that, after same was served, he filed suit in the District Court of El Paso County, Texas, and it is the judgment rendered on the trial of that case of which we now complain.

At the time of this accident, yea, at no time, did Sowers ever reside in El Paso County, Texas, and none of the injuries sued for occurred within the State of Texas. He performed no service for this railway company at any place within this state. This is what may be called a transitory cause of action, and as such may be maintained under what is known as comity in any jurisdiction, but it is our understanding, which understanding is supported by numerous authorities from this court, that wherever this suit may be maintained, the rights of the parties are to be determined in accordance with the laws of the state where the accident occurred. In the absence of a showing to the contrary, it might be presumed that the laws of the jurisdiction where the accident occurred were the same as the law of the forum, but in this case it is definitely shown and admitted that the law on this subject in New Mexico and the laws in Texas are, and were, materially different. We will assume, therefore, that the Court becoming apprised as to the law of New Mexico, was in duty bound to apply its rule, not only as to procedure, but as to right of action in the determination of the issues between the parties, and it is because this was not done, and has not been done, either by the trial court or by the learned Court of Civil Appeals, that we now complain.

Section 1, article 4, of the Constitution of the United States,
222 requires the courts, in fact, all courts, to give full faith and credit to the public acts, records and judicial proceedings of

every other State, and it has been decided that every other state, as used in this connection, also includes the territories and the District of Columbia. It is quite evident that the District Court of El Paso County and the Court of Civil Appeals have failed and refused by permitting the judgment in this case to stand, to give full faith and credit to the public acts of the legislature of the Territory of New Mexico, and because of this failure and refusal they have not only repudiated the solemn declarations of a solemn legislative body, but have as well presented a federal question, as it has been decided by the Supreme Court of the United States that the failure of any court to so give full faith and credit will give that court jurisdiction to review the proceedings. We mention that simply for the purpose of showing that those who wrote the constitution were so impressed with the idea that this full faith and credit should be given that they were not content to leave the final determination of that question to the adjudication of any state court, but have made the refusal on the part of state jurisdiction to faithfully adhere to that constitutional demand sufficient excuse to give the highest court on this earth jurisdiction of the cause of action. The authorities cited under the propositions above make this entirely clear to our minds.

Sowers had no inherent right to bring this suit in the State of Texas. The courts in this state owed him no duty. Whatever the conduct of the railway company may have been at the time of this accident, it is certainly true that none of the laws of this state had been outraged. He was beyond the pale and protection of our state laws at the time of this occurrence, and, as said above, it is only because of the courtesy or comity that exists among the states that this man is even permitted to take up the time of our courts to secure a redress of his grievances. What were the rights that this man had in the courts of Texas? He had only the right to have his cause of action adjudicated and the status of the litigants determined by such rules as had been established by the proper authority in the jurisdiction where the accident occurred. He certainly had no more,

223 and, in this connection, we desire to state this proposition, which we think cannot admit of doubt, and that is, that there cannot be given to this man in Texas a cause of action and create in his favor a right which he did not possess under the laws of New Mexico. The Court of Civil Appeals, in passing upon this question, seemed to treat the statute of New Mexico as one of jurisdiction, and determined that it was not within the province of the legislature of New Mexico to determine the questions of jurisdiction for Texas courts, but an examination of the act in question clearly indicates that it is not so much a statute of jurisdiction as it is a statute determining the rights and liabilities of master and servant. It fixes the status of the parties as to liability, and this goes to right of action itself. For instance, in section one, of this act, the following language appears: "Hereafter there shall be no civil liability under either the common *or* law or any statute of this territory on the part of any person—corporation for any personal injuries inflicted or death caused by such person or corporation in this territory unless (here follows a statement as to the requirements), and

unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur in the District Court of this territory in and for the county in which such injuries occur, or in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or in event such claim is asserted, against a corporation in the county in this territory, where such corporation has its principal place of business," etc. "It being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries except as herein otherwise provided."

It was shown, on the trial of this case, that all of the requirements as to residence, jurisdiction, courts, agents, etc., could have been complied with by Sowers, but, for reasons best known to him, he decided to make a dumping ground of the courts of the State of Texas of this law suit. No excuse whatever is attempted to be given by him as to why he did not endeavor to comply with the terms of this statute. Our position under this law is that this man
224 had no cause of action at all in the State of Texas, because his rights must be determined by the laws of the Territory of New Mexico, and, for the reason that he did not comply with that law, his right of action was gone. He evidently knew of this statute, because he served the notice provided therein, but, under the article quoted, it is made a condition precedent to his right of action that this suit shall be maintained at a given named place in the Territory of New Mexico, within a given length of time, or there can be no civil liability. The special charge made the basis of this assignment presented this statute. It was based upon admitted facts. There was no controverted question to be presented to the jury. It was simply up to the courts of Texas to give full faith and credit to the public acts of a sister jurisdiction which was acting at the time within its proper province in passing the act.

It has been decided by the federal court that the several states and territories have the right to regulate by law the relation between employers and employed, and to fix by legislative enactment the liability of the former for the acts and negligence of the latter. Southern Pacific vs. Schoer, 114 Federal, 467, and authorities there cited. This act of the Territory of New Mexico was before Your Honors once, before, on application for writ of error in the Buttron case from this same Court of Civil Appeals, 15 T. C. R., 339. The difference between the Buttron case and the one at bar is that in the former, the railway company, under the provisions of this act, filed suit in the territory of New Mexico, and got an injunction against Buttron, and the Court of Appeals at San Antonio held that this act, in so far as it was involved in that controversy, was binding, and Your Honors denied a writ of error. Now, you can't handle this act in piecemeal. If the Territory of New Mexico had the right to authorize the defendant to file suit, and get a judgment preventing the plaintiff from prosecuting suit elsewhere, then that legislature undoubtedly had the right to prescribe the terms upon which the

plaintiff would have a cause of action. Inherently, Sowers had no cause of action against the railway company. It is only by reason of some rule of law which has been established that he would be permitted to complain of the defendant company, and why may not that rule of law be changed? It certainly has been changed
225 by the legislature of New Mexico.

Your Honors recently had a case in which practically this same question was determined, and decided adversely to the contention of Sowers in this case. I refer to the case of Chicago, Rock Island & Pacific R. R. against Thompson, 16 T. C. R., 979. The opinion was by Associate Justice Williams. Case decided November 14, 1906. In that case Thompson, in his application for employment obligated himself that he would within a given time after receiving injuries give notice of the claim in a certain way, and the application concluded with this statement, "and my failure to give notice of such claim in the manner and within the time aforesaid, shall be a bar to the institution of any suit on account of such injuries." This application was made in the Indian Territory. Thompson was hurt in Oklahoma Territory, and filed suit in the State of Texas. The railway company plead the provisions of this contract in bar of recovery, and you practically held with the railway company. Now the only difference between the Thompson case and the one at bar, that we can discover, is that Thompson made an individual contract with the railway company, whereas, the legislature of New Mexico, by its solemn acts, and by reason of the statute now under discussion, has made a contract with all persons on the subject under discussion. The latter ought to be more binding than the former. The acts of a legislature, presumed as they are to be constitutional and proper, and unless they vitiate some express provision of the proper constitution, are absolutely binding on all peoples who come within its provisions, but there is no such presumption in favor of a private contract between individuals. In the Thompson case, the provisions of the contract were attempted to be defeated because of the provisions of article 3379 of our statute, which relates to contracts limiting the right to sue within less time than the statutory period.

We quote the following significant statement from the opinion of Judge Williams: "And if we could hold that the statute did apply, we do not see how that would enable the courts of this state to render a judgment for plaintiff as upon a cause of action which had accrued to him under the laws of Oklahoma, if, according to
226 those laws, he has none which he can assert. It is only by virtue of the principles of comity that the plaintiff, a citizen of the Indian Territory, can ask our courts to enforce a transitory cause of action which he claims accrued to him in Oklahoma, and this does not entitle him to have a portion of the law of that territory affecting his claim disregarded because it differs to ours. His right of recovery must be given by the law of the place where his injury occurred, whether that law be ascertained by proof or presumption in the absence of proof. Second Wharton Conflict of Laws, page 1108, *et seq.*, and cases cited."

Now, what stronger declaration do we need in support of our

contention than the above? It is distinctly held in that case that all of the questions raised on the contract in dispute and its effect upon the case were to be determined by the laws of Oklahoma, and why? Simply because the accident occurred in Oklahoma. It makes no difference where the man resided. His status is definitely fixed by the laws of the place where the accident occurred. There are many other portions of the opinion in the Thompson case that we might with profit set out, but feel sure that this court will consider the same in its entirety. We assume that the Court of Civil Appeals did not have the Thompson case at hand when the opinion in the Sowers case was rendered, as no reference to it is made in their opinion. If, as decided by the Court of Appeals in the Sowers case this is simply a question of jurisdiction, and that the legislature of New Mexico can not legislate upon such a subject for the Courts of Texas, then it is equally true that the Rock Island R. R., could not make a contract with Thompson in another jurisdiction, and ask to have the same sustained in the courts of Texas unless the contract had been executed in accordance with the laws of this state, and such a position, to our minds, is absolutely ridiculous.

The Court of Appeals seems to take the position that the statutes of New Mexico have no extra-territorial force. Just what is meant by this position we are unable to determine, but may say in rebuttal that the laws of Texas have no greater extra-territorial force than do the laws of New Mexico, and if suit had been instituted in New Mexico on a cause of action arising in Texas, it ought to be determined according to the laws of the State of Texas, as-
227 suming that it had been properly presented to the court, as was done in this case. The principle, we are, in this connection, contending for is upheld in a number of cases in this court. In the case of Mexican National Ry. Co. *vs.* Jackson, 89 Texas, 107, you declined to entertain the cause, for the reason that the accident occurred in Mexico, and her laws were so dissimilar to ours that you could not apply them.

The McCormack case, seventy-first Texas, 660, was a suit by the widow for the death of her husband, and in this case you distinctly held that, if the cause was maintained at all here, it must be maintained as per the laws of Arkansas where the accident occurred, and that the statutes of the two states were so materially different that the courts here could not undertake to enforce the Arkansas statute, and hence denied the right to bring suit here.

The same thing was held in the Richards case, 68 Texas, 375; and in the case of Thomas *vs.* Western Union Telegraph Co., the Court of Civil Appeals at San Antonio held that there could be no recovery for mental anguish in Texas on a cause of action which arose in a state in which no such recovery was permissible, and in so holding, let us stop and ask what the court was doing by so deciding. The answer is that it was simply giving full faith and credit to the public acts of a sister state.

The same court, in denying recovery in the Buttron case, was but applying this rule. So that nothing remained in the case at bar,

after the court ascertained what the law of the jurisdiction where the accident occurred was, but to apply it, and its failure so to do was in contravention of the plain constitutional provisions of the U. S. as well as of all precedent.

We have asserted, as one of our propositions, that the courts of one state may not pass any judgment upon the validity of a statute of another state or territory. In other words, it is not within the province of the courts in Texas to declare unconstitutional a legislative act of a sister state or territory unless such court is following the construction and precedent established by the Court of last resort in such state and territory, or a decision from the Supreme Court of the United States. There is quite a difference between passing upon the validity of a statute and simply placing an
228 interpretation upon it or in construing it. The courts of one state may construe the statutes of another state, and may place their own construction thereon, in the absence of precedent in the state where the legislation was enacted, and this will be authorized, but when a state court declares a plain and unambiguous statute of another state unconstitutional, it is usurping a power never given to it by the fathers. The court at San Antonio, in passing upon this case, did not construe a statute of New Mexico—indeed, it was not necessary to construe it—but went farther and declared it absolutely null and void. This that court had no right to do, if we read the authorities aright. In this connection, we call your attention to Johnson against New York Life Insurance Co., 23 Supreme Court Reporter, 194, and Eastern B. & L. Association against Williamson, twenty-third Supreme Court Reporter, 527, as well as Baltimore & Potomac R. R. *vs.* Hopkins, 130 U. S., 210. We think the case of Glenn *vs.* Garth, 147 U. S., 369, is also in point.

The right to maintain a transitory action anywhere is always based upon the prior right to have the issue finally determined according to the laws of a jurisdiction where the suit arose, and, if this right cannot be enforced, then there is no right to maintain the transitory action in a foreign jurisdiction. Such we believe to be the holding of this court. It is not necessary in the determination of this case to go farther than to consider the first article of the New Mexico statute under consideration, wherein it is positively declared that no cause of action shall exist in a case like the one at bar. The statute goes to the foundation of the transaction. It involves more than the jurisdiction of a Texas Court. It fixes the status of these parties, and we are at a loss to understand why a liability can be created in Texas on a cause of action that did not accrue in this State different from what the cause of action would have been if the suit had been maintained in the other state. It is quite unnecessary for the Court of Appeals to hold that the statute under consideration was iniquitous. Such a question is not open for inquiry.

In conclusion, permit us to state again that this is not a question of jurisdiction, but is a question as to whether a right to maintain the action at all exists, and this question must be determined
229 by the laws of New Mexico, and it is only the province of the courts in this state to interpret those laws, and not to pass

upon their validity. Sowers had only the right to the enforcement of such rights as were secured to him under the laws of New Mexico. He had selected the place for the performance of his labors. He was charged with the knowledge of the laws in this jurisdiction, and, by voluntarily remaining there, he became subject to those laws. Those laws were a part of his contract of employment with the railway company. The laws of any state are a contract between its peoples and may not be repudiated by private individuals who are affected thereby.

Second Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling plaintiff in error's thirteenth assignment of error in that court, which was as follows: The court erred in sustaining the demurrer of the plaintiff to defendant's plea, set forth in its amended answer, in which the laws of the Territory of New Mexico were pleaded as a defense to this action, when it was shown and admitted that no such suit had been brought by the plaintiff in the Territory of New Mexico, as provided by the laws of said Territory, said laws being fully pleaded and introduced in evidence.

Additional Propositions Under This Assignment.

Same as those stated under the twelfth assignment, which are presented under this one without the necessity of repetition.

Statement.

The defendant pleaded Chapter 33 of the Acts of the Thirty-fifth Legislative Assembly of the Territory of New Mexico, passed March 11, 1903, entitled, "An Act Establishing the Law and Procedure in Certain Cases." (Tr. p. 9.) The act is set out in full in stenographer's record, pages 195-200. The plaintiff excepted to the answer of the railway company setting up this law, said exceptions being several in number but all attacking the validity of the act in question. (Tr. pp. 15-16.) The trial court sustained each and all of these
230 exceptions, and held that the act was void (Tr. p. 18*a*), struck out answer pleading that this accident occurred in the Territory of New Mexico.

Authorities.

Same as those under twelfth assignment.

Argument.

What has been said under the first assignment will apply with equal or greater force under this one. The trial court held that the act in question was unauthorized and in violation of the act of

Congress creating the Territory of New Mexico, because same had not been submitted to Congress for approval, because same was a special law, because same was contrary to the organic law of New Mexico, because same was in violation of Section 17 of the organic law of that Territory. The court also held that it was in violation of the fifth amendment of the Constitution of the United States, likewise that it was class legislation, and also that it was in violation of the fourteenth amendment of the Constitution of the United States. This Court, in the Buttron case, cited under the first assignment, decided each of these questions adversely to the contention of appellee, and we do not deem it necessary to indulge in an extended argument. The court has disposed of the entire question, and having done so, we assume that it will be held that the trial court was in error in sustaining these exceptions.

Third Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling plaintiff in error's fourteenth assignment of error in that court which was as follows:

The court erred in sustaining plaintiff's exception to the defendant's answer, which exception was filed in this cause on the eleventh day of December, 1905, for the reason that the defendant company did not own any line of railway in the State of Texas; that it did own and operate a line of railway in the Territory of New Mexico; that it did have agents in the said Territory of New Mexico upon whom service may be had; that it was shown that the courts held regular sessions in the said Territory of New Mexico, and in the county where said accident occurred, which said courts had jurisdiction of the said matters and things involved in this con-
231 troversy; that it had not been shown and was not pleaded that the plaintiff ever brought his suit in the Territory of New Mexico within the time fixed by the act pleaded by defendant, or within any other time; because the act of the Legislature pleaded by the defendant was not a local or special law, but a general law; that the said act so pleaded was not contrary to the organic law of said Territory, because said act so pleaded by the defendant was not contrary to the seventeenth provision of the organic law of the Territory of New Mexico; because said act so pleaded was not in violation of the fifth amendment of the Constitution of the United States, or any other amendment; because said act of the Legislature was not void, was not class legislation, but was and had been held to be such legislation as the Legislature of the Territory of New Mexico might have enacted; because none of the reasons pleaded by the plaintiff in said exception, or any subdivision of said exception, were valid, nor should said exception, or any subdivision thereof, have been sustained.

Wherefore, the court erred in sustaining the plaintiff's said exception to the defendant's answer setting forth the law of New Mexico as pleaded in said answer.

Statement.

Same as under twelfth and thirteenth assignments.

Additional Propositions.

Same as those stated under twelfth assignment.

Authorities.

Same as under twelfth assignment.

Fourth Assignment of Error.

The Court of Civil Appeals erred in overruling and in not sustaining plaintiff in error's fifth assignment of error in that court, which was as follows:

The Court erred in the seventh paragraph of its main charge, in which the jury are instructed as follows: "If, therefore, you believe and find from the evidence and a preponderance thereof that the defendant, the Atchison, Topeka & Santa Fe Railway Company, permitted the roadbed, track or side track over which the
232 engine upon which plaintiff, George A. Sowers, was riding to become soft and out of repair, so that as a consequence (if you so find), the point of the rail dropped so low that the pilot thereof came in contact with or struck a frog; that such acts, if any, constituted negligence upon the part of the defendant railway company."

Because said charge of the court sums up a certain state of facts, conditions and happenings, and tells the jury the same constitute negligence on the part of the defendant railway company. Said charge is in error, because the same is a charge upon the weight of the evidence, and further, because same assumes the existence of facts which do not exist, and because the said charge finds the facts which the jury, and the jury alone, should find to exist, and for said reason the entire seventh paragraph is error, and should not have been given.

First Proposition Under This Assignment.

In this State it is not permissible for the court to say that any given combination of facts will or does constitute negligence, but it is the duty of the court to leave to the determination of the jury whether or not such combination of facts was negligent, and, under the paragraph of the charge set out in this assignment, the court directed that the facts therein set up, if established, would constitute negligence; this was error.

Second Proposition Under This Assignment.

This charge was erroneous, because it was upon the weight of the evidence.

Third Proposition Under This Assignment.

It is the exclusive province of the jury to give effect to the facts, and to pass upon the weight of the evidence, and to find whether or not any given state of facts really exists. This charge took that province from the jury.

Statement.

My name is George A. Sowers. I am 26 years of age, and am plaintiff in this case. Prior to the twenty-ninth day of April, of this year, was brakeman on the Atchison, Topeka & Santa Fe Railway Company, and my run was on the Albuquerque division.
233 Gallup is 158 miles west of Albuquerque. I was front brakeman and my wages were a little over a hundred dollars a month. I have had nearly three years' experience in railroad work, and consider this my profession. Have worked for the Northern Pacific, International of Mexico, and for the Alamogordo Lumber Company. I worked in the capacity of log train brakeman for the Alamogordo Lumber Company. On the twenty-ninth day of April of this year, we left Winslow in the evening going to Winslow, and returned again to get another engine. The cause of our return was on account of an accident out west of Gallup; the engine left the track there, and we went back to get another engine. Mr. Cain and myself went back for the engine. Mr. Cain is conductor of the train, and is our conductor. I will now proceed to tell the jury everything up to the time I was hurt. We went back to Gallup to get a new engine, and we left the train at the west yards. West Yards is about five miles from Gallup. We got the engine there at Gallup, and started out of the yards; instead of going out of the main line, the yardmaster told us to go down over No. 5. I was standing on the pilot of the engine while we were going over No. 5 track, expecting to throw the switch there, but got injured before I got there. I got this engine from in front of the depot. One of the switchmen had brought the engine out, and I got the engine there, and the yardmaster asked me how long it would be before we were ready to go. I told him probably two or three minutes, as soon as the Conductor gave the orders. The conductor was then in the office, getting his orders. We were standing immediately in front of the office. One of the switchmen told me we would have to go in on the scale track down there. The engineer moved the engine up there. One of the switchmen opened the switch, and let us in there. We stopped there, waiting until the conductor came. In the meantime the yardmaster had told me that we would have to go down No. 5—the main line was blocked—and to leave the switch open, not

to close any switch," "to leave the switches as you open them." As soon as the conductor came, I got up on the pilot, ready for this switch. I got on the footboard of the pilot. The pilot on which I was standing was made of slats, horizontal slats. I was stand-
234 ing on the second slat; two slats from the bottom are kind of cut out, leaving a place for the footboard. This is on the right side of the engine. This footboard was on both sides, but I was standing on the right side. I was standing on the right side, because that is the engineer's side, on the right side. The footboard was put there to ride on. For the brakeman or conductors, or trainmen to ride on. When I got up on that step, I stood there. I gave the engineer a signal of al- ready, to go ahead, after the conductor got his orders and came down there. My duties with reference to moving this engine was to throw all the switches, open them, and close them. At that time we only had one brakeman with the engine, and that was myself. The other brakeman was at the west yard, taking care of the train. My position on this train was head brakeman. After I got started, I was standing on the pilot; we went down through the yard there, got right close to this switch, and I was looking for the switch, rather to see how the switch was. All at once the engine ran right up in front of the frog, the pilot kind of ducked, dipped down on the rails, scraped down on the rails, and hit the frog and injured my foot. My foot was caught between there and the end of the pilot. It broke the pilot, broke the bottom slat and the next one, bent them in and up both of them. When my foot was caught, I attempted to get away. I did evidently get away, for the engine ran some short distance without me; I jumped and fell down. I think the cause of the pilot to go down towards the rails was on account of the low joints in the track there. By low joints, I mean where the track is soft and goes down. Where the joints are low, uneven, don't stand up like the balance of the track. The engine strikes them—the great weight of the engine; when the forward truck strikes this low track, it lets the engine down, and the pilot down on the rails. The pilot struck the rail before it struck the frog. I did not get off the pilot before it struck the frog, because I couldn't; did not have time; could not get off; did not see it in time; could not have time to get away. Here is the shoe I wore at the time the accident occurred. My foot was hurt to such an extent that it was amputated. At first my toes were torn clear off; when I went to the hospital they dressed them there; trimmed them up. They were torn clear off, right at the time of the acci-
235 dent. My toes were left right there on the track, until one of the switchmen buried them the next day. They are cut off from the instep towards the toes, and it has the effect of making me a cripple, and less able to get around as much as I used to; cannot run, cannot jump, and it makes me lame. I had never been notified of this low joint or soft place. I was keeping a good lookout ahead, and noticed the frog, but it looked all right; also noticed the cowcatcher and engine when I got on it, and there was not a thing wrong with it, as near as I could see. Prior to the accident I had been working for the Santa Fe since the twenty-sixth day of

February, and was familiar with the rules of the company, but did not know that they had any rules or regulations prohibiting brakemen from riding on the pilot. Have read the rules before, many times, and rode on the pilot, because it is near my work, where I am supposed to be, getting to switches, and considered it necessary to ride on this pilot at the time, as I have to be right down close to my work, right where I could get this switch quick; had I been back in the gangway, I would have been unable to see this switch; the majority of those engines are steaming so bad you could not see ahead of the engine.

COUNSEL FOR DEFENDANT: No allegation here about the bad condition of the engine.

COUNSEL FOR DEFENDANT: We have alleged, may it please the court, that Mr. Sowers was in a proper place; we are now showing negligence in the engine steaming.

COURT: I will overrule the objection.

COUNSEL FOR DEFENDANT: Except.

I will state again that I got on the footboard, because I have to be close to do the work, and see ahead and see the switch, where I could get at my work in less time. From where I stopped I got off from the switch that I had to stop at, at the time of the accident, something like seventy-two, three or four feet. It would have been necessary to open five switches before I could have gotten my engine on the main line. I was crossing the frog on No. 5 track, between No. 5 and No. 6 track-. I never crossed any frog before I got to this one in the west end of the yards, but had up in the east end of the yard. At the time I got on the cowcatcher to ride down
236 through the yards, but did not know at that time where the switches were located. I knew where the main line switch was. I knew about where No. 3 switch was. That is all of them I had ever taken any notice of. I had never been over track No. 5 before; it was my first time down there. That picture is a correct representation of the yards. The track number is not on there. The main line. That picture was taken looking west. The frog that caused the accident was right here. With reference to those rails, there is a short rail right there. You can see that rail there. I am talking about the short rail between this frog and the end of the first long rail. That goes out here, out of west end, over the main line here. Here is the frog right here. Goes out the main line right here. I was going down this track between the two rails here. *I was going down this track between the two rails here.* These pictures are also a correct representation of the yards.

COUNSEL FOR DEFENDANT: The picture showing this particular place, we have no objection to that.

This picture shows track No. 5, and they are not all looking west.

COUNSEL FOR DEFENDANT: We object to the introduction of any of these pictures, because none of them show the place of the accident.

COURT: What do you expect to show by these pictures?

COUNSEL FOR PLAINTIFF: The yards.

COUNSEL FOR DEFENDANT: The yards are not in question at all. We object to those pictures.

COURT: I will sustain the objection. Gentlemen, these three pictures will not be in evidence, and you will not regard anything you may have seen in them for any purpose in this case.

Cross-examination.

This picture No. 1, there, was taken about thirty or forty days after the accident; I don't remember just the date. It may have been less than forty days. It was after I left the hospital. I had them taken by —— who works at Gallup. The first time I left the hospital, I think was on the twenty-fifth of May, and this accident happened on the thirtieth day of April. I may be mis-
237 taken about the date I left the hospital, but know it was before the first of June, about twenty-five or twenty-six days after I got out of the hospital. I went in the hospital at Albuquerque about the first of May; don't remember the exact date I got out, but know it was before the first of June. I did not bring the discharge I got there with me. This picture was taken about forty days after I was injured.

COUNSEL FOR DEFENDANT: We object to the picture being introduced for the purpose of showing the conditions at the time of the accident; forty days is too long a time to tell the condition of the track on the thirtieth day of April.

COUNSEL FOR PLAINTIFF: This picture represents the location at the time, or about the time of the accident.

COUNSEL FOR DEFENDANT: We do not object to them showing the location.

COURT: In the absence of the testimony, the objection is good.

Redirect examination:

This was in the night time. When I started down the track I did not notice its condition; supposed it to be a good track, and did not notice any difference in the track at that time. The engineer, or the engine, moved probably five or six feet after the pilot struck the frog. I know it, because, when the engine,—when the pilot has passed far enough from the top of the rail to release my shoe—release my foot—and I jumped off to the right, right over the track. I jumped far enough to get over there after I was hurt, as the engine backed up, and they put me right back on the pilot. I examined the pilot, and it was broken. At the bottom of the pilot there is heavy wood on the bottom of it, and a heavy iron band around the bottom. The iron band was bent back in and up. The beam ran across there horizontally; in other words, I mean it ran parallel with the ties. This was a passenger engine, and I do not know its weight. The number of the engine was 1133, one of the big engines. I think they call them a pacific type engine.

Q. I will ask you whether or not you ever heard of or saw any of the other employés, ever heard of conductors riding on the pilot?

COUNSEL FOR DEFENDANT: Object to the testimony. What
238 he had ever heard, what somebody else did frequently, would not justify what he did on this occasion.

Q. I will ask you whether or not you are familiar with the customary place and practice of the brakemen and conductors in riding while doing work in the yards?

COUNSEL FOR DEFENDANT: Object to that—customary place for other people to ride—other people may have habitually ridden in dangerous places; it would not authorize him in doing so.

COURT: Overrule the objection.

COUNSEL FOR DEFENDANT: Note the exception. This case is not being tried under the laws of Texas, but under the law of the United States, which is the common laws.

I am familiar with the usual and customary place and practice of the brakemen and conductors in riding in doing their work in the yards, and they usually ride on the pilots of engines when working and this has been the customary practice ever since I have been connected about railroads, for over a year on the Santa Fe, and some time previous to the time I worked for them, and since. It is done every day. I have suffered pain by reason of this injury at the time of the accident and since.

COUNSEL FOR DEFENDANT: The gentlemen have introduced and made part of their case a notice. The notice says nothing about any injury or damages by physical pain or mental suffering, and to save the point we make that objection, and no notice of that kind has ever been served upon the agents of the company, and no matter of that kind could be proved or established in this case.

COURT: Overrule the objection.

COUNSEL FOR DEFENDANT: We except.

I suffered the amputation of that part of my foot, by having it torn off that night, and by being a little more than three months on crutches, and ever since that it has bother- me; that is, it pains me yet, the cause of this being that my toes were cut off here, and, besides, a man has to go through the world a cripple.

COUNSEL FOR DEFENDANT: That is argument; we object to the argument.

I naturally feel that I am not able bodied like other men, I am not like what I used to be.

Yes sir, I had accepted the railroad business as my pro-
239 fession, and had fully intended to follow railroading the balance of my life. I have no other profession or calling. I am familiar with examination, or physical condition, now necessary to secure employment on all well regulated railroads in the United States.

Q. State whether or not anyone having this injury you have got

can stand a physical examination for employment as brakeman or any other employment on the railroad, by railroad company.

COUNSEL FOR DEFENDANT: We object to that. The petition is silent upon that subject. He says he is incapacited for railroad service. Nowhere does it say anything about the inability of the plaintiff to stand an examination for railroad work.

COUNSEL FOR PLAINTIFF: We will withdraw that question.

I am familiar with the duties of conductor and brakeman. I do know what is necessary for them to do when they are performing duty on a train. With the condition that my foot is in, I could not perform the duties of freight brakeman, because I could not get around to do my work, could not get around right. I mean that I could not get around fast enough; could not walk, run, or get off and on cars like freight brakemen have to. I have not secured any permanent employment since I was hurt. I have tried to get into different stores in town where I have lived since, Winslow, and have tried other places; tried to get into the ice plant there. I have worked some since in saloons there, which I had to do to get something to eat.

When the pilot struck the frog it jarred the engine all over, When the cowcatcher first struck the rails, I thought that the wheels had dropped off the rails, and the pilot scraped along on the rails. I thought the wheels ran on the ground, on the ties, when the cowcatcher struck the frog. I did not get off at that time, as I did not have time. From my experience when riding on an engine I can tell when it strikes a low joint or a low place in the track. This was a low place in the track. I hardly am able to explain the cause of low joints, but in my own language will say that it would be better—any kind of soft material underneath the ties, when the engine runs up on that it would drop in, while the other part of the track would be still firm and solid.

Recross-examination:

240 I have been railroading very nearly three years; not steadily; have had several interruptions. I began railroading on the ninth day of March, 1899, at Tacoma, Washington. This paper is the Northern Pacific clearance, and shows passenger brakeman. Part of the time I was passenger brakeman, and part of the time freight. I was then twenty years old. Up to that time I had been working in the Northern Pacific coal mine, in the shop, doing everything; that was six years ago. While not employed at railroading, was idle most of the time, but was looking for railroad jobs all the time, for some reason. I had to work at something else, though, when I could not get railroad jobs. When I left the Northern Pacific I went down into California. Did not do anything there for about six or seven months, because I did not have to, and had some money: was not hunting for a job particularly. I worked in Los Angeles four days and quit there; did not like the job. Then I came over into New Mexico and worked for the Alamogordo Lumber Company shortly afterwards. I worked there eighteen months.

After I came down from Washington, I worked in Gallup between working for the Alamogordo Lumber Company. I worked in Gallup for Tom Hines, tending bar; don't remember just how long I did work there; I worked one summer; worked part of the time for him, and worked part of the time there at Albuquerque for Henry Hills, and part of the time for Frank Fair. Frank runs a restaurant there, and a saloon. I worked in the saloon and tended bar for Henry. I don't remember just how long—three or four months. I received $50.00 per month for this. Then I went back east, looking for a railroad job. I did not find any. I went to three or four different places. For a while I worked in Iowa for a construction company there; worked about three or four months, until I came to Alamogordo. It shows here that I went to work for them in 1902. I worked for them until December 18, 1903, in the capacity of log train brakeman. I did not work from February 1, 1902, to May, 1902, as a lumber man under Lew Taylor. Yes, I worked under Lew Taylor. I did not work from January 1, 1902, to December 15, 1903, as a log train brakeman under Lew Taylor; worked from June first. I did not work all the time from December, 1902, to December 15, 1903, as a lumber man. In February, 1902, to December 15, 1903, as a lumber man. In February, 1905, I was working for the Atchison, Topeka & Santa Fe Railway Company
241 out of Winslow. I went to work at Winslow on the twenty-second of February. I came from Gallup. I worked at Gallup for Johnny Gordon; he is a hotel and saloon man. That is my name, and I signed it. I wrote all that application. Some of this is true, all except that. I had to make my time go somewhere; I did not put in all the places I worked, at all. Just went to work and filled that application in. That is not the truth of where I worked there, so far as that is concerned. I filled this application up very good, I believe. I laid around Gallup waiting for a job a long time. The majority of that statement is true. My Northern Pacific statement is true, and my time as log brakeman there. I don't remember the date I went to work for Lew Taylor, but did not work as log brakeman from February, 1900, to May 1, 1902; not two years. I did not work all the time from December, 1903, to February 15, 1905, for W. H. Wright, as a brakeman. I worked for him about thirty days. I did not work that length of time, from December 30, 1903, to February 15, 1905, as a lumberman, up there; I made that statement because it was necessary for me to fill that out in order to get to work. It was necessary for me to show that I had been employed somewhere. I went to work for the Santa Fe company on the twenty-second of February, 1905. I did not quit as lumberman on the fifteenth of February; it was several months back. I worked in the lumber woods a little, handling logs, help bring them on the train under Samson, I believe. I must have been working up there several months, probably five months. When I was a lumberman, I was not railroading, but then I was not a lumberman all the time. I was railroading all that time I said I was. I was railroading all the time I said I was on that application, and some more, working for the Northern Pacific a short time after that.

After I quit the passenger service there I worked on the Northern Pacific a very short time, as a switchman at Roswell. I don't remember anything much about that application; I remember making it out for a position on the road. I did not tell them I had been a saloon keeper, because I have never been one, and did not tell them that I was a bartender, as I did not want to. I have never had anything to do with gambling. I am working in a saloon since I was injured; not all the time. I don't know how long I did work in them. They were very kind to me up there; give me preference to make a few dollars. I get about three dollars when I work. I am supposed to stay there and keep the bar, when I am working at that kind of business, until another man goes to work. There is gambling in that saloon. When I am on duty I do not keep the gambling. Mr. Brown kept the place at the place where I worked before I came down here, in Winslow. I was tending bar for him at night, all night long. I have nothing to do with any other feature of the saloon when I am there, than the bar. While I was at Albuquerque I worked for George Minor awhile as bartender. I never was very good bartender, just followed it to make a little money; never followed it as a profession. I followed railroading because I wanted to be a railroad man. My reason for quitting was to get another job. I did not consider the lumber business bigger than a job as brakeman; simply worked at it when I could get no railroad position. I spent two years with the Alamogordo Lumber Company because I had a position as log train brakeman. I did not spend two years in the log camp; that must be a mistake in the application.

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I don't think the wheels of the engine I was riding on the night of the accident, I don't think touched my foot. The rails upon which the wheels ran did not strike my foot. My foot struck the frog. I know the difference between the guard rail and the frog rail. I say my foot struck the frog. I helped write the petition, and read it over to myself, but left it to my lawyers to decide. The guard rail and a frog are separate and distinct features of appliances, but are not on the same side of the track—on opposite sides. The photograph will show you how they are located, one right opposite the other. I know how wide a railroad track is; the frog sits here, and the guard rail sits over against another rail. I rode right side of the engine, with my feet somewhere near the rail on the right side. I was going west at the time; part of my foot went to the top of the frog, part of it did not. I knew that the frog was on the right side. The frog was on the right-hand side of that pilot in there; the pilot sits like this. My foot was over the wing of the frog. The wing of the frog is part of the frog. It is put there to guide the wheels through the frog. The frog is supposed to be spiked down there altogether. Prior to the time that I got to this frog, I felt the engine go down. We had an electric headlight in our engine, a bright one, and I know where the frog was, also knew where the next switch was. I could see them, as I carried a lantern. I do not know whether the pilot was in good condition when I got on it, but it looked to be. It is my duty to

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know whether it is all right or not, and it looked so to me that night. I think the standard height above the rails is about four inches; I am not positive. I was expecting to alight from the pilot to open the switch, and had my back to the engine, and my face was turned forward, and I was holding to the rod on top of the pilot with my left hand. As I remember it, I was standing right straight up on the pilot. I felt the pilot scrape the rail; before that I felt the pilot strike the rail. This engine was going a little over four miles an hour, a little faster than a man can walk. It stopped a few feet after it struck the frog. He started to stop the engine before we got to the frog, before even we struck on account of the scraping of the pilot on the rail, but it was before I had time to get off. I cannot state how far the engine went past the frog, something like five or six feet. He applied the brake right quick. He did not stand right there, because I know I jumped right there at the frog, and the pilot ran beyond me a little ways. When I went to get on the pilot again they came down from the engine; they backed up and stood along on the right hand side of me. When I fell and hit the ground the engine passed along about the cylinder, probably six feet or eight. I fell down immediately. When I got on the ground I jumped about two or three jumps and went down. The pilot was bent up. The wing of the guard rail sits straight up. The end, at the end of the frog, is supposed to be sawed off straight. By making that the wing, guard rail, over there, and that the track, the wheels could pass westward over the track, and the flange be between this and that. That rail is straight, but does not turn around the end; comes in here, then goes out; this end of the wing is straight. I was standing right there on the pilot. If this pilot had struck this rail before getting to the guard rail, it would have remained on top of the rail—it reaches beyond the rails, on the side. It reaches beyond the rails. If that rail raised the pilot this way,

I do not know that it did raise my foot up; I don't know
244 how it did raise the pilot. No sir, I am not mistaken about my foot setting in, because the pilot did not stand like that, here is the pilot over here. I say that the wing of the frog is what cut my foot. The wheel ran on this rail, straight. I must have been standing immediately over this wing of the frog. The pilot did not drop so as to touch that rail; this is the rail it touched. I do not know that it was those two rails on a level, as I don't know whether they were level or not level; I know this rail [illegible]k the pilot, and had a tendency to bend it up, right in here, o[illegible] the point of the rail, and struck my foot. The frog is supposed to be on a level with that rail. That rail would not strike the frog, if the pilot would strike the wing of the frog, nor would it strike the rail right alongside of it, because it was at least half an inch higher than this main rail. I found this out just after the accident occurred, just as quick as I could get back there and look at it. Mr. Frankling was on the train at the time. I had an appointment to meet him in Gallup. I went down and examined the track myself; I did not make any examination of it; I noticed that much. There was only half an

inch difference between the frog and the main rail; at least, that was all I could see. I don't know how much difference there would be having an engine on it. The switch ties are supposed to run clear over the two tracks. Switch ties run clean through the whole thing. If the wing of the frog and that main rail were upon the same—they were on the same ties—they would not be on a level, but cannot say how much difference there is when an engine is on it, but do know there is a little difference. The day referred to I do not know if there was any difference. The pilot was bent up. The front end of the pilot is sort of a diamond shape, with bands around the lower slat form straight edge like, about two inches and a half, the pilot comes along this, and dips down, and strikes that guard rail, the edge of the pilot striking on the guard rail, two perpendicular rails, but this would not necessarily make the pilot go down; being a heavy piece of machinery, it might have a tendency to jump over it, if it were hit. Of course, I cannot say whether it would have a tendency to be downward instead of upward without any other intervening cause. I was expecting to get
245 off, and had my lantern in my right hand and my other hand back on the rod, that hand holding onto this pilot. I was standing on my right foot, my left foot was also standing on the pilot with the other one. At the time I was injured I think I had both feet right on the pilot. I was standing with my back, sort of like that. That is my shoe, and that is the mark on it; the pilot made that mark, and the end of the frog made this one. I got my foot between the end of that frog, wing of the frog, and the pilot. If it had been raised up by any obstruction like that, it would have raised my foot, too, but the pilot struck that in another way; I cannot explain just how my foot was cut. I was figuring on getting off to open the switch. I found the pilot to be bent afterwards; it was mashed back. That mark on the shoe was caused evidently from the force of the pilot; my toe came in between there, then that would bring my toe down in here. You understand, when this pilot went scraping along on this rail here, why, my first impression was to get off, if you find the engine is on the ground. I did not jump off right away, for I got caught before I could jump. I was riding along there, and my first impression was to get off. I was standing right on the pilot, I could not get off, because the pilot caught on before I had time or opportunity to get off. I did not get off—the question was asked me there; I am trying to tell you. My foot went down in this way; this was pressing against my foot; my foot had not got free—that would have the tendency to throw the pilot up. This shoe was the only thing between the rail and the pilot, I will admit that. My shoe is not cut in two. My shoe stood the pressure of that rail pressing against the pilot like this. There was nothing between the pilot and that frog except my shoe and foot, that I know of. It apparently did not cut my sole in two. The wing of the frog was the only intervening thing between my foot and shoe, between the end of the pilot and the end of the guard rail. My foot was between the wing of the frog and the pilot. Some-

thing else hit the pilot except that. This dragged right along on top of the rail. Now, this wing would have a tendency to strike this, and this lower slat. My foot struck first in between the pilot and the frog. That is where I lost my toes. Left them right on the track. My shoe in this position, hanging right over that
246 guard rail, like that, would not necessarily have a tendency to raise this pilot up until I had passed over the guard rail. I was released when I got my foot in that frog, like that. When it struck me I was not released until I got across that point; about twelve inches; my foot was released, something like that. It seems to me that it has drug me about two feet; just don't know how long it drug me. It did not throw me over the engine; my foot got down between the point of the pilot and this frog. I caught myself and jumped off to one side. The pilot was broken. There was nothing intervening between the end of that frog and the pilot except my shoe, that I know of. So far as I know the iron band struck that groove right here. The iron band around the bottom of the pilot is about two and — half inches up and down, by half an inch thick, but is not made of sheet iron. I stood on the lower slat. From the way the pilot broke around here, I was injured here, the way my toes laid on the track, the way I remember it, I should say it was the bottom of the pilot that cut that groove in my shoe. The uprights of the pilot are made out of wood, the bottom, I think, is made of oak, and the band is of iron. I saw this pilot at night, and from the way it was splintered, I thought it was oak. My foot was cut off there and I was suffering. I did not stop to find out whether the bottom slat was made of oak or soft pine; did not have time; was running back up town. Mr. Daze, Mr. Lancaster and Mr. Cain put me on the cowcatcher going back. I was not faint. I was sitting right over the pilot, looking at it, right down in front of me, and could not help noticing that the board was oak. The headlight did not shine right down on the pilot; it shone right out in front of the track. There was very little light from the headlight on the pilot, but I had a lantern there. It was from the lantern and headlight, both, that I saw what kind of wood this was. I thought that I stood back about as far as I could get. I don't think that I could have stood sideways. I had my foot two inches and a half over the edge of the pilot. This is my shoe. I felt the pilot scraping on the rail, but this all happened, you know, in a very short space of time. I was standing on the top of that pilot because I supposed it a safe place to ride. I supposed it was as safe there as any part of the train. I did not expect to run in
247 that frog. The gangway is as safe a place as any on the engine. I don't think that riding on the pilot is any more hazardous place than elsewhere on an engine. The pilot is more convenient to my work; I have got to be right where I can get at my work quick. I could have gotten into the gangway of the engine. I could have stood on the step leading to the gangway, but would have had to run clear around the engine and it would have required a little time to get down around, and could not have seen

the switch. If I had leaned out and tried to see the switch on that side, I would possibly have gotten knocked off by the switch, hanging outside of the engine, with my lantern; yes. The engineer could see the switch. His duty is to stop when I give him the signal. If I had been on any other part of the engine except on the running slat of the pilot, I would not have been hurt. I was not employed as a switchman. I was employed as head brakeman. The place of the head brakeman is where he can do his work. I did not do any work on the pilot of the engine, nor would I have done any in the cab. When the train is in motion a man is on the train somewhere—wherever he has got to be to do his work. Liable to be on top of cars, or somewhere on the engine. I know my duty did not require me to be on that engine. Not supposed to be back in the caboose; supposed to be on the head of the train somewhere, wherever there is work to be done. What I know about how my foot was injured I worked out from what I saw. Even if I did notice what kind of wood the pilot was made of, I did not know as much how I was injured until afterwards, when I examined the track thoroughly. The engine was scraping some at the time, but did not scrape when the engine backed back. He backed over this frog before I got on the engine again, before he got down on the ground where I was lying. I knew he backed back. The crew did not come to where I was until after they had backed over the frog. They backed at least ten to fourteen feet from the frog when I got on the pilot of the engine, back towards Gallup, east of it. I saw the engine back over the frog, but did not watch it. When I was injured I left my shoe at the Page House. When I was hurt the shoe stayed on my foot until it was cut off. I do not know how my toes came to be left on the track. The pilot and the wing of the
frog cut them off, pinched them off, getting between the
248 two caused it. I don't know how they got out of my shoe.
Bedow or some of the other boys, buried them, so they told me. I was not there at the time; I don't know who picked them up. I will take off my sock, and show it to the jury. My foot was cut off in the joint here. The biggest part of the ball of my foot is cut off from the foot. This is right back on my big toe, the metatarsus bone; the next joint would have been the toe joint. I have all my foot except the toes, the joint of the toes. I made a statement about this accident, but don't remember just when. I told the claim agent a lot of stuff there one day, and I told him my theory of the accident, as near as I could remember, or as near as I knew at the time, I believe I did sign a paper. That is all I knew about it at the time I told him. I don't know what he put in there. I don't know what day it was when I made the statement to the claim agent. I don't remember. I believe I did make a statement to Doctor —— about the first of May. There was no claim agent present when I made the first statement. I made it to some hospital attendants who asked me about it. That is the statement and it is all right. I think that is my signature. I don't think that fellow asked me for a statement until I had been in there two days, somewhere between the thirtieth

of April or the first of May. What different impressions I have since gotten were not necessarily different for the purposes of this suit.

Q. You say here, when asked the question: "In your opinion, was there any defect in the track, cars, engine, pilot * * *

COUNSEL FOR PLAINTIFF: You read that, Mr. Sowers?

A. I don't know; I signed my name there.

COUNSEL FOR PLAINTIFF: Was that read over to you?

A. He asked me some questions. I don't remember what the questions were: I don't remember what the answers were; that first part of it there, I don't think that was the way I was injured. At that time I think I told that fellow, "In my opinion the track was defective, or some foreign object on the track, causing the lower part of the pilot, on which I was standing, to be broken." There was some obstruction in the track there that struck that pilot. I cannot tell what that fellow put down. I did not say foreign object at all.
249 I think that is my signature. I did not read that paper when I signed it. That fore part of it was all right. I don't know whether there were any objections to my reading it over; that might have been put in there after I signed it up, for all I know. I do not charge anybody with doing anything like that, though. There was some obstruction there, on the track. The wing of the frog is an appliance right there with the track. Inseparable from the track. I don't know altogether how long I have been in the Territory of New Mexico; I lived at Albuquerque just about four years and a half, or five years, since I came down here, I guess. I came from Tacoma, Washington. I was born in the State of Indiana. I went out to Tacoma when I was quite young, along in '87, I think. When I first came out there, I went to school until I was about fourteen, and then went to work. Until I was twenty I did a little bit of everything, worked in the shop; was always able to make a living all the time. I have been at Gallup twice now; been there two different times. My father did live there for some time; he has moved away from there now. I have not got any more home than I got right here; that is, at Winslow, now; that is where I make my home now. I have worked most at Winslow, Arizona. I first went to Winslow in February. I went down there to see about going to work. Then I went to work for the Santa Fe, out of Winslow. I came from Gallup. Previous to that I was working in a saloon at Gallup, and just before that in a saloon in Albuquerque. At saloon work in some places, I got three dollars a day, some places not so much. Three dollars a day is ninety dollars a month. I am not able to get ninety dollars a month at that work now. I was not able to make as much in a saloon as at railroading because I did not work all the time in a saloon; did not make it my profession. I believe the last work I did before going to work for this defendant was in a saloon. No, I am not getting ninety dollars a month out of that work now, only seventy-five a month. I do not call this my profession; just did this to have something to do. When I went to work for the railroad I made up my mind right there I was going to stay. I wanted to be

a railroad man always had wanted to be one; I considered I was better in that than anything else. I did not go to work for the railroad and stay right with it. I never did work for the
250 defendant before this time. It was my first job. I worked for them about nine or ten weeks before I was injured. That is as long as I have ever worked for them. Prior to that time it has been about a year since I was employed by a railroad. During that year's time I was laying off. I don't remember when it was that I made a statement after the one you have shown me, along in June, before Mr. —— came around to my house, my room, and asked me a lot of questions, and wrote them down on a paper, and asked me if I would not sign my name to it, which I did; I told him I would accommodate him to anything he wanted. I don't know what he put in there, don't know whether it was false or true. I don't know whether he read it over or not, I don't believe he did. I signed it because he asked me to. At that time I was not figuring on a law suit at all. It was somewhere along the first of June, 1905. I don't think I had ever consulted a lawyer at that time. It was a month after I was injured. I don't know whether there is a court held at Gallup. There are courts held at Winslow. Don't know what kind, though. I did not know whether they had courts at Winslow that could try railroad suits or not; I just knew there was a court down there. There is a court at Albuquerque, held there regularly. I have never been in the court house at Gallup, never paid any attention to it. Never was in this court house before. I understood that this case could be brought here through Mr. Patterson and Mr. Wallace, after we had quite a little correspondence; I don't remember just when the first correspondence was. There was courts in the Territory and in town through which the coast line of the Santa Fe runs where I could have brought this suit. There are courts in Navajo county. The county seat is Holbrook. There is a court at Holbrook. I don't know whether Las Cruces is a county seat or not. I knew the rules of the defendant company. It was my duty as brakeman to know what orders the conductor and engineer had. At the time I was injured, the weather—it had been raining a few days previous to this, and I believe it had rained a little this day. It was generally wet. The main line, or parts of it, was in a soft condition. Because of that track the engine that was pulling the train, when we
251 started out from Winslow, went off the track, and it was because of the track. This was not caused by excessive rain, but was caused by a broken rail; the rail broke right under the engine. The track was soft, all right, there, whether the softness of the track caused that engine to go off, I don't know, because I did not examine that. It had been raining right along during the winter and up through spring. Had never seen a winter like that one. It was considered to be an unusually wet season. I knew on the main line there were several soft places of track. I knew that the engineer had gotten orders to look out for soft track. I saw some of the orders, that read in places along. I did not see any orders covering this yard. I was supposed to see all the orders the conductor and engineer received; whether they showed them all to me, or not, I don't know.

I did not see any orders they got at Gallup, going west; had not seen any of them yet.

Q. Isn't it your duty and a rule to ask to obtain all orders?

COUNSEL FOR PLAINTIFF: The rule is the best evidence.

Q. He says he knows the rules.

COUNSEL FOR PLAINTIFF: If they are in writing, I want the rules.
COURT: Answer the question.

It was my duty to ask for and inquire of the conductor or the engineer of all orders which he received governing the movement of my train. When we got out of the yards, then, the brakeman says, "Give us the orders." Don't have time to inquire about the orders when I get on the engine. My engine stood there, near the depot office. The conductor had not gotten his orders when we were standing there; when he came out he brought his orders with him. I saw him with a handful of orders; he said "Ready" and I gave the signal to go right down through the yards. It was customary when we got out of the yards to get on the engine and see what orders he had. That is the rule with all railroads. I did not hear the conductor read the orders over there to the crew, as I was riding on the pilot of the engine. When the conductor took the orders to the engineer I was on the pilot, for the purpose of opening these switches.

252 The engine was standing still. The engineer had the orders in his hands. As far as I know of, the engineer did not read any of the orders back to the conductor. I was on the pilot of the engine. This was a passenger engine. I think they have four—two wheels on each side, to a truck; that is, one pair of trucks. Only one small wheel, I think. I cannot tell exactly how near those wheels are together; couple of feet apart; something like two feet apart. They are in front of the engine. The back end of the pilot comes right up close to the front wheels; don't know the distance. The wheels of the pony truck would be about here, back in here somewhere. I cannot tell just how long the pilot is. I was not standing immediately upon the point. I was standing right over the frog, inside the rail. That pilot was built in kind of a diamond shape; the bottom part, of course, slopes back. It was four or five feet from where you stood to where the wheel struck the rail; I never took any measurement; this is merely my judgment about it. I have had occasion to examine the frog since the time of the accident. As far as I can tell, the frog is made all—one piece goes in this way, and another piece on the other side of same, and this frog rail on each side of that, supposed to be bolted through with bolts. When I looked at it it was bolted through. All frogs are not alike; some are different. I do not know whether it was bolted with bolts or not since the time it was put down. When you go down and look that over, the rail runs clear out; there is cast iron in there, I know that. I know it is iron, heavy iron. My foot was caught right here, right on that point. There is only one place I could have been injured at, and that is at that point. I am willing to tell the jury under oath that my foot, or any part of my foot, was cut by the edge of the

wing of that frog. To the best of my knowledge, I was right there at that point, and nowhere else. I was standing on the lower slat, which was about two and a half or three inches back, above that rail. That picture there shows the frog on a level with the rail, and it shows the bolts running through there. I cannot see but one; now I can see the other. That is not a solid piece running from here to here, and I am certain of it. I will admit that this picture shows both from this wing of the frog to the opposite wing of the
253 frog. The east rail of the frog is between five and six feet, and is of lighter steel than the other. The frog is heavier material than where that bridge is. The ties there were in there at the time I was injured. All switch ties are supposed to run entirely through the track, which would be one length of ties under the two tracks. When I got hurt I do not know whether it was customary to build all frogs that way. In order for the frog to have caught my foot it had to be higher than the rail. I cannot tell how much higher it would have to be to have caught my foot; I may have had my foot tilted just the slightest bit, you know, over the end of that, but if it was that way it would have caught my foot and throwed it underneath, and raised the pilot. My foot is about four inches and a half. I was standing on top of that iron band; the nearest that the ball of the rail would be to the step, or slat, band, is about four inches, when everything is all right. If everything was all right, it was not necessary for my foot to have gotten down there so as to hit the front of this frog, or that I would have had to put my foot over and under about eight inches, or that the frog would have to be raised up about eight inches. From the bottom of the slat on which I stood near the track is about three inches. I was standing about over the rail. I was right out there on the slat, the bottom of which stands about four inches above that. The bottom of the slat is four inches above, in good condition, the ball of the rail. I was standing, then, as much above the rail, and as much above the wing of the frog, if it was in good condition, as that pencil is above my thumb. In order for my foot to come in contact with the wing of the frog as it did, I don't know how low the ball of the rail was that the wheels run on. I don't know whether it was six and a half inches or not; I know it was far enough to allow the pilot to strike this wing of the frog. The wheel could not let the pilot go down far enough to have the pilot on top of that slat strike the ball of the rail; that is impossible. It is the bottom of the slat that got down on the rail. I am no machinist, and cannot explain how that could sink in the track, the low joint in the track, let the pilot down, the distance between the top of the slat where you stood and the rail upon which the engine runs, without the pilot striking the ball of the rail,
254 upon which the wheels run; I can only say, as stated already, that that frog must have been high. The slat got down on the rail; that is as far as I know. I don't see how it could have caught the ball of the rail. I think that it should be about four inches between the bottom of the slat to the top of the rail, and on top of that supposed to have had a safeguard, the thickness of the slat upon which I stood. Anyway, between the bottom of the slat to the

top of the slat was two and a half inches, or three. I don't think that I would have two and a half or three inches space between myself and the frog if the bottom of the slat could strike the rail. The end of the frog caught my foot in such a way that it turned it over, pulled it down a little bit; that is the best explanation of it I can give. Here is the space where it dropped, that distance, four inches, and the frog caught my foot that way. I did not say that the wing of the frog was half an inch higher than the rail. I just told you that the end of the frog caught my foot below that; that is the way it happened. I did not say that the frog came up flush with this point. I mean to say that that wing of that frog up here hit this pilot, the rim around that pilot. I don't know where it hit it. I know it touched it. I know something hit it. I don't know what became of the rail that the frog was bolted to. I don't know that it was bolted to a rail at that time. That picture there was taken forty days after. I introduced that picture to show the track, I don't think that the track was bolted at the time of my injury. If it had been bolted like you show in your picture, if the frog raised up, the other part of the track raised up, too, being bolted together; would raise up without the other. I don't know how much, but it could raise that other one, at least to the best of my knowledge and belief it would. If both raised up the pilot would strike them both together. If they would have raised up together, and were the same, it would possibly have kept my foot two and a half inches above any danger, and would raise the pilot from that, also, I think, the slat on which I was standing. I was on top of the slat when I was injured. I would have been injured anyway if my foot was on top of that slat, and not in front of it. I would have got some kind of an injury, because I was standing on
255 top of the pilot. If my foot had been here, back there, and had not struck out to the edge there, I would not have been injured. I know the end of this caught my foot and turned it right back that way. I was standing on the frog and the pilot, two and a half or three inches thick. I do not claim that this frog came higher than the top of the slat on which I stood. The track is not as high as the slat on which I stood. Never did get as high as the slat on which I stood. I cannot tell just how my foot got down in between that wing of that frog and the pilot. I can tell them that it was negligence on the part of the company in having the frog get above the track, having that low joint there, so the pilot could go down on the track. The rail is on the right-hand side of that frog, going west, and it is a continuous rail. The pilot reaches out over the edge of that rail, as well as the pilot going over the wing of that frog. If the wheels dropped down at any place more than the distances between the bottom of the slat and the top of the rail, the pilot would immediately strike the rail, and would tend to raise the pilot, the pilot and the slat, up. As the wheels continued to go up the pilot would have to raise up also. It was about half an inch higher than this rail. This slat is two inches and a half. The pilot would slide along on the rails if the wheels dropped down in a low joint. Here is the pilot running that way; here is the wheels back

here, and if they continue to go down, this is bound to be higher back here than it is right here. When the pilot strikes this outside rail, it is much lower than it is where the pilot runs back this way; this much lower than it is where the rail or pilot strikes it than where it strikes this point. The pilot would stop on top of the rail, where it struck it. It should have stayed on top of the continuous rail upon which the wheels run. I was standing on the point of the pilot, just inside of the rail, the full length. I stood right in the middle, where my foot caught that frog. I know from the circumstances, the way the accident occurred, that I was standing right there. I knew something had hit my foot right there at the frog; was not anything else there but that frog. I did not use it until forty days after. I did not know positively of it that night. Nobody had to tell me, I just knew it. I knew it hit something right there at the frog; I could not tell whether the frog, or what it was. I
256 noticed when we went back there that there was nothing else there to hit it. I did say the day after the accident that it might have been some obstruction, some foreign body on the track, and I say now that it was something there that struck my foot. I know that it was no foreign substance that struck my foot, and know that it was the end of the frog. The day after the accident I heard some kind of an obstruction was there. I did not write what you have on that paper, even if I did sign it. He asked me some questions, and I answered them, and I signed my name to it. I most positively did not say that it was some foreign object on the track, or defective track, and I don't think that I signed a paper stating that, but know there was some obstruction on the track. I certainly do call a frog, or part of the track, an obstruction, where it catches the pilot. I call a low joint an obstruction if it is low enough to make other obstructions there. I did not put that foreign object in that paper at all. This cane I bought in El Paso. I have used a cane about half of the time; used it a day or two before I came down here. I did not bring it with me, because I forgot it. I have used this cane since I came here. I did not use it constantly; did not need it all the time. I can get around part of the time without a cane; don't like to carry one if I can get along without it. I gave Mr. Hudson a notice of it, if you call that a statement, and swore to it, and made a sworn statement to the claim agent, and filed it with the agent of the company in New Mexico. As near as I know, I did this perfectly and correctly. That is the statement, and it is the truth, so far as I knew at that time. Mr. Wallace or Mr. Patterson wrote that out. I don't know where it was at the time, up at Winslow or Gallup; somewhere along there. When they sent it to you I took it over to the notary public. I read it over, saw it was correct, and took it over to the notary, Mr. Kuchenbecker, had him swear me to it, went up and gave it to the agent at Gallup. That statement you have there, "the engine and the pilot came in contact with a frog, or some obstruction on the track, and before I could get into a place of safety, the cowcatcher broke, threw me down, and my foot was caught by the pilot of the engine," is not correct for my foot was caught
257 by the pilot, and then I was thrown down. That paper is true. That is substantially the way it happened; couple of

words in there just reversed, that is all. One should not swear to paper that reverses itself. I read it over before I signed it, a couple of days afterwards. No Santa Fe people asked me to sign it, and no employés were interested in my signing something that was not true. I went before a notary public of my own selection. He was William Kuchenbecker, I had him take my affidavit, and when he took it, paid for it, and delivered the original to the agent of the company. I believe that is the one I delivered to Mr. Henderson. I think that is just as I delivered it to him. I think there are some interlineations in the copy attached to my petition. That is the one I sent them. I had two papers acknowledged, and they are both the same. I am not entirely mistaken as to how I got my foot hurt. My foot got in between the end of the wing of that guard rail and the point of that pilot. It is not a fact that I was standing on my left foot, and dangling the right one. The right foot was injured. I was not standing facing the engine like that. I was standing on top of that slat. I was standing up like this, and this—the end of that—caught my foot and turned it right back, that way. That is the only explanation I can give you about it. I remember exactly how my foot was. A brakeman does not always ride on the pilot, holding to the timber or rod, but has got to hold to something. Could not hold to that piece of timber that is at the head of that engine on the pilot, or a rod, that is screwed to it. I did not say anything about a handhold; I said I had hold of that rod there, the handle there. It is located right behind me on the pilot, from the end of the pilot, I would say; I was right here, standing like that, and just had to reach around behind. The point of the pilot was out in front of me. I cannot swear how close, probably a case builder, the man that builds the engines, somebody that knows more about an engine than I do, knows. I looked at that engine, but did not take any measurement of it. The wheel of the engine, front wheel of the engine, on the rail, was about four or five feet back of me, but I did not make any measurement of this engine; I cannot tell you for sure how far they are. I can just guess at it, that is all I can do. This
258 was a passenger engine, with little pony trucks. The wheels are pretty close under the back of the pilot, a foot or two, something like that; I am not sure about it. I won't stick to anything so far as those measurements are concerned; I told you that a while ago. I would not stick to it; so far as that is concerned, I made no measurement of that. In my judgment it was about twenty inches back. From the heel of the pilot to where I stood it was about half way up the pilot. Say, we will take this for the space now, say take this twenty inches, then put half the length of the pilot, which is about five feet, then I was probably two and a half feet from the base of the pilot. In my judgment, the distance I was from the wheels was about twenty-two and a half feet, but cannot tell whether it is right or not.

COURT: He says he has no judgment about it; he is just guessing at it.

Redirect examination:

Mr. N. J. Hudson is the agent at Gallup. That is my signature. He gave me a receipt for it, and it was for a copy of this paper. I delivered that to Mr. Hudson.

COUNSEL FOR PLAINTIFF: If the court please, we introduce the receipt and notice, which notice is as follows:

The Territory of New Mexico to the Atchison, Topeka & Santa Fe Railway Company, and its Officers and Agents located in the Territory of New Mexico:

GENTLEMEN: You, and each of you, are hereby notified that on and prior to the thirtieth day of April, 1905, I was employed by the Atchison, Topeka & Santa Fe Railway Company, as a brakeman on a freight train out of Gallup, New Mexico; that on or about the thirtieth day of April, 1905, between midnight and daylight, a. m. I was ordered by my superior to assist in running a light engine out of the yards of Gallup, New Mexico. We were ordered to run over track No. 5, and it became my duty, as switchman, and as one of the employés in charge of said engine, to open the switches in order to get the engine off of this track on the main line, and for this purpose it became necessary and a part of my duty, as well as the
259 usual and customary practice of the brakemen, to get out and ride on the cowcatcher in order to locate the switches and throw same quickly, and avoid delay. That while I was standing on the cowcatcher and keeping a careful lookout ahead, the engine ran onto a soft place in the track, struck some low joints, and, by reason of the defects in the track and roadbed, the engine sank down, or the track and rails sank with the engine, and the pilot came in contact with a frog or some other obstruction on the track, and before I could get into a place of safety the cowcatcher broke, threw me down, and my foot was caught by the pilot of the engine and so badly mashed that it became necessary to have it amputated near the instep; that by reason of the injuries to my foot, I am now and will be the remainder of my life so maimed and crippled as to be unable to follow my profession of railroading, or do any other manual labor. That the following persons, and their addresses, are all the witnesses to the happening of the facts of said accident, as near as I have been at this time able to learn, to-wit: Chas. Daze, engineer, Winslow, Arizona; R. N. Lancaster, fireman, Winslow, Arizona; Chas. Cain, conductor, Winslow, Arizona; Rob't Howard, Gallup, N. M.; Wm. Brown, Gallup, N. M.; Wm. Bedow, Gallup, N. M.; Pete Buckly, Gallup, N. M.; F. McSparrow, Gallup, N. M.; N. J. Hudson, Gallup, N. M.

The above statement is made by me under oath, and is as full and fair a statement of the nature and extent of my injury, the manner and way in which it occurred, and the cause of same, as nearly as I am now able to give or make.

GEORGE SOWERS.

Sworn to and subscribed by affiant, George A. Sowers, before me, at my office in the town of Gallup, and Territory of New Mexico, this the twenty-ninth day of June, A. D., 1905.

[SEAL.] W. F. KUCHENBECKER,
Notary Public, McKinley County, Territory of New Mexico.

It was further shown that the above notice was served on defendant's agent at Gallup, N. M., on the twenty-ninth day of June, 1905, by plaintiff, in person, and that N. J. Hudson was the agent
260 at said time for defendant at Gallup, N. M., and received said notice as its agent.

Mr. GEORGE A. SOWERS, plaintiff, being recalled, testified as follows:

The length of that rail from the frog on track No. 5, east rail, to where the joint is of the lighter rail, is five feet and ten inches. I know it from measurement I took of it. I know I am not mistaken, as I have the measurement with me which I took last summer. I know for a fact that the two slats of the pilot were beveled. I noticed that when I got on the pilot, also noticed it after the pilot was broke. (Record, 1-108.)

CHAS. DAZE, for the defendant, testified, among other things, as follows: I have been a locomotive engineer for about nine years, and was in the Gallup yards on the night of this accident. I had been called to take out this train. The engine was in good order. It was a passenger engine. There were one pair of wheels on the front truck; they were about thirty inches in diameter. It was not a double track. There is a small wheel back under the cab, then three drivers. In the front we have one small wheel. Sowers was the front brakeman. Just before the accident and at that time he was riding on the pilot. I could see him very plainly, as I had an electric headlight, which was burning brightly, and he was standing, as I should judge, about sideways to me, facing the center of the track. His left side was nearest to me. He was on the right side of the pilot. I was on the right side. The first thing that I noticed that there was anything wrong was when I saw him tumbling off the pilot, and I stopped almost instantly, as we were running very slow at the time. I got down and he showed me his foot. He had been standing about midway, I should judge, on the pilot, and was just in the act of stepping off. I was watching him, and I saw him tumbling to the ground, and I stopped instantly. I stopped because I saw him fall, and for no other reason. I did not feel any jar or jerk of the engine at the time, or just before I stopped. The time I got off the engine nothing had happened to the pilot. I did not see the engine go down before the plaintiff fell off. After
261 Sowers called my attention to his foot, I made an examination of the pilot, and I found that the bottom band that goes around the pilot was sprung inward, also that the bottom slat was splintered. This slat was about two inches in thickness, and composed of wood. I had used this engine about fourteen months. The

pilot rode about two and a half or three inches above the top of the rail. That would put the top of the lower slat about four inches above the ball of the rail. The pilot was not bent up at all. We used this engine after the accident. This engine, during the balance of that run of 128 miles, did not strike any frog, or switch or track. (Record, 144-163.)

Authorities Under all of Above Propositions.

Choate *vs.* S. A. & A. P. Ry., 90 Texas, 88, on rehearing.
Railway Co. *vs.* Anderson, 76 Texas, 249.
Railway Co. *vs.* Wilson, 60 Texas, 142.
Railway Co. *vs.* Elledge, 15 T. C. R., 546.
Railway Co. *vs.* Lee, 70 Texas, 501.
Railway Co. *vs.* Hill, 71 Texas, 459.
Campbell *vs.* Trimble, 75 Texas, 271.
Railway Co. *vs.* Gaither, 35 S. W. R., 179.
Railway Co. *vs.* Cassiddy, 40 S. W. R., 200.
Martin *vs.* Railway Co., 56 S. W. R., 1013.
Railway Co. *vs.* English, 59 S. W. R., 627.

Remarks.

The statute has denominated certain things as being negligence. It has required certain duties to be performed by a railway company, and the failure to do those things or to perform the duties thus imposed is negligence as a matter of law, and the court may so declare in a charge to the jury; but unless the acts complained of are negligent as a matter of law as thus explained, it is not the privilege of the court to designate them as negligence in its charge; but, whether or not those acts complained of, or any combination of them, constitute negligence, becomes a question of fact to be determined by the jury, and it is not within the power of the court to determine an issue of fact for the jury. The court is not permitted to prejudge any case, or to give effect to any combination of facts the jury may have believed, although each of the facts existed which were submitted in this charge, yet that the same did not constitute negligence, and unless the jury found not only that those facts were true,
262 but that they constituted negligence, the plaintiff was not entitled to recover in this case. This charge, therefore, practically took the case out of the hands of the jury on a material issue. It was on the weight of the evidence, and was a denial to the defendant to have all the facts passed upon by the jury. The propositions stated under this assignment are so well established, and by such a long line of authorities, that we do not deem it necessary to quote at length from them. The Court of Appeals at Dallas, in the Elledge case, *supra*, passed upon this question within the last two or three months. We, therefore, ask the court to read the authorities cited, and confidently believe that but one conclusion could be arrived at, that is that material error was committed in giving this section of the court's charge.

The charge enumerates certain issues of fact, and then concludes with the statement that if those things are found to exist, that they constitute negligence upon the part of the railway company without leaving to the determination of the jury whether or not those things were negligent, this question was taken away from the jury by the trial court, and in doing so the province of the jury was plainly usurped.

Fifth Assignment of Error as a Proposition.

Original No. 4.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's fourth assignment of error in that court, which was as follows:

The court erred in refusing to give defendant's special charge No. 6, as follows: "At the request of the defendant you are hereby instructed that if you believe from the evidence before you, that a position on the pilot of an engine was one of danger, and particularly in the event of a collision with any obstruction of any kind on the track, and that plaintiff's presence on the pilot contributed approximately to the injuries he sustained, then he cannot recover herein, and your verdict must be for the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

263 *First Additional Proposition Under This Assignment.*

This defendant is entitled to have an affirmative charge on every defense that has evidence in support thereof, and in this case there was evidence which tended to support the theory that it was dangerous to ride on the pilot of an engine.

Second Additional Proposition Under This Assignment.

Where the evidence shows, as it does in this case, that the position occupied by the injured party at the time he was hurt was one of danger, and but for such position, which had been voluntarily assumed, injury would not have been sustained, then the defendant is entitled to a verdict, and this issue should have been submitted in this case.

Statement.

Special charge No. 6, asked by the defendant, and refused, is correctly set out in this assignment. (Tr. page 25, line 21 to Tr. page 26, line 4.) See statement under fourth assignment.

Sixth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's sixth assignment of error in that court which was as follows:

The court erred in refusing to give defendant's special charge No. 5, as follows: "At the request of the defendant, you are hereby instructed that no custom or usage, should you believe from the evidence one has been shown, can ever be relied upon to excuse an act of itself negligent, and if you believe from the testimony that the act of riding on the pilot of a locomotive proximately contributed to plaintiff's injury, you will find for the defendant, as such act of riding on the pilot of an engine is negligence as a matter of law."

Because same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Additional propositions under this assignment same as
264 those stated under the first assignment.

Statement.

Special charge No. 5, set out in this assignment, was asked by the defendant and refused. (Tr. p. 25.) See statement under fourth assignment.

Seventh Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's seventh assignment of error in that court, which was as follows:

The court erred in refusing to give defendant's special charge No. 3, as follows: "At the request of the defendant you are instructed that there is no evidence in this cause to show that any officer of the defendant company, or anyone having authority over the plaintiff to prevent same, knew of his practice, if any such practice existed, or the practice of any one else, if any such practice existed, of riding on the pilots of its engines under the circumstances under which the plaintiff was injured in this case, and therefore you will not consider the evidence introduced on the subject of such practice of the employés of the defendant, and such practice or custom would not relieve the plaintiff from the consequences of his negligence in riding in a place of danger, if you believe from the evidence herein that it is negligence to ride at such place, as negligence has heretofore been defined to you."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

Statement.

Special charge No. 3 set out in this assignment, was asked by defendant and refused. (Tr. p. 22.) See statement under fourth assignment.

Eighth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and fail-
265 ing to sustain plaintiff in error's tenth assignment of error in that court which was as follows:

The court erred in refusing to give defendant's special charge No. ——, as follows: "At the request of the defendant, I charge you that as the accident to the plaintiff occurred in the Territory of New Mexico, that therefore the common law, as understood, is the law governing this action as to fellow-servants, and that under such common law the defendant would not be liable if the injury to the plaintiff was caused by the negligence of a fellow servant. A fellow servant of plaintiff is a servant of the defendant who, at the time of the injury, was a colaborer with plaintiff on the engine, or those persons whose duty it was to keep the track No. 5 in repair. Therefore, if you believe that any such fellow servant of the plaintiff was guilty of negligence, if any, and that such negligence contributed to cause, or did cause, the injury to plaintiff, that then the defendant would not be liable therefor, and if you further find that such injury would not have occurred except for such negligence of such fellow servants, that then your verdict should be for defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

First Additional Proposition Under This Assignment.

It being admitted that this accident occurred in New Mexico, and it having been shown that the common law, as applied to fellow-servants, was in effect in that jurisdiction, and it being the duty of the court to submit every material issue or defense for the determination of the jury, and the evidence in this case having raised the issue embodied in this special charge, it was error for the court to refuse it.

Statement.

Special charge No. —, is correctly set out in this assignment. It was asked by the defendant and refused. (Tr. p. 27.) See statement under fourth assignment.

266 Wherefore plaintiff in error submits this its application for writ of error, and asks that same be granted, and that on

hearing, the judgment of the Court of Civil Appeals and of the trial court be reversed, and cause here rendered, or if the court shall decline to enter such a judgment, then plaintiff in error asks that the judgment of each of said courts be reversed and cause remanded.

Respectfully submitted,

J. W. TERRY,
A. H. CULWELL,
Attorneys for Plaintiff in Error, Atchison, Topeka & Santa Fe Railway Company.

CLERK'S OFFICE SUPREME COURT.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing fifty-nine pages contain a true and correct copy of the original petition for writ of error in App. No. 5365, Atchison, Topeka & Santa Fe Railway Company, Plaintiff in error, *vs.* George A. Sowers, Defendant in error, said application for writ of error having been refused by the Supreme Court of Texas on March 13, 1907.

Witness my hand and the seal of said Court at the City of Austin, this the 2nd of April, 1907.

[SEAL.]

F. T. CONNERLY,
Clerk Supreme Court of Texas.

Judgment of Supreme Court of Texas.

In Supreme Court of Texas.

267 ATCHISON, TOPEKA & S. F. RY. CO.
vs.
GEO. A. SOWERS.

From El Paso County, 4th District.

MARCH 13TH, 1907.

This day came on to be heard the application of Atchison, T. & S. F. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that said application be refused; that the applicant, Atchison, Topeka & Santa Fe Railway Company, and its sureties, A. Kohlberg and J. J. Mundy, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court this the 29th day of March, A. D., 1907.

[SEAL.]

F. T. CONNERLY, *Clerk,*
By J. S. MYRICK, *Deputy.*

Endorsed: Application No. 5365. Atchison, Topeka & Santa Fe Ry. Co. *vs.* Geo. A. Sowers. Copy of judgment in Supreme Court. Application for writ of error refused. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 30, 1907. J. Murray, Clerk.

Petition for Allowance — Writ of Error.

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE A. SOWERS, Defendant in Error.

268 Petition for Allowance of Writ of Error.

To the Honorable J. H. James, Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas:

Comes the Atchison, Topeka & Santa Fe Railway Company, by its attorneys, J. W. Terry and A. H. Culwell, and complains that in the record and proceedings, as also in the rendition of a judgment in a suit between The Atchison, Topeka & Santa Fe Railway Company, Plaintiff in error, and George A. Sowers, Defendant in Error, in said Court of Civil Appeals in the State of Texas, being the highest court of law or equity in said State to which the said Plaintiff in Error could appeal and obtain a decision on the merits of the issues involved in said cause and same being the court which has the final custody of the record in said cause, the Supreme Court of the State of Texas having refused to grant Plaintiff in Error a writ of Error herein, and a final judgment having been rendered against the said Plaintiff in Error by the said Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, on the 19th day of December, 1906, and in which Plaintiff in Error's motion for rehearing was overruled by said Court on the 16th day of January, 1907; that in said cause there is drawn in question the validity of a statute of the Territory of New Mexico, and the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas having failed and refused to give full faith and credit to a public statute of the Territory of New Mexico, and the said judgment of the Court of Civil Appeals being repugnant to Article 4, Section 1 of the Constitution of the United States and to that portion thereof reading as follows: *"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."* It being claimed by the Plaintiff in Error that on the facts of this case same should have been tried and determined in accordance with the laws of the Territory of New Mexico, where the accident occurred out of which this suit arose, and there being at the time of said accident and at the time of the trial of this cause in the courts of the State of Texas a public act of the Legislature of the Territory of New Mexico in full force and effect, and under the provisions of which act the
269 Defendant in Error herein had no cause of action whatever in any court of the State of Texas, which public act of the said Legislature of the Territory of New Mexico was presented, plead and proven on the trial of this said cause, and the Court of Civil Appeals

of the Fourth Supreme Judicial District of the State of Texas having failed and refused to give full faith and credit to said public act of said Legislature, but having rendered a final judgment against this Plaintiff in Error notwithstanding said public act of said Territory denying the right to maintain this action and denying any right of recovery whatever. And the opinion of said Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas being against the validity of the said Statute of the Territory of New Mexico; all of which appears in the records and proceedings of said suit; manifest error hath happened, to the great damage of the Atchison, Topeka & Santa Fe Railway Company; wherefore, the said The Atchison, Topeka & Santa Fe Railway Company by its attorneys prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY AND
A. H. CULWELL,
Attorneys for the Atchison, Topeka & Santa Fe Railway Co.

April 1, 1907.

Allowed by—
JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas.

Endorsed: The Atchison, Topeka & Santa Fe Ry. Co., Pl't'ff in Error, *vs.* Geo. A. Sowers, Def't in Error. Petition for allowance of writ of error. Filed in the Court of Civil Appeals at San Antonio, Texas, Apr. 1, 1907. J. Murray, Clerk.

Writ of Error.

270 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, holding sessions at San Antonio, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit and being the court which has final custody of the record in said cause between The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, and George A. Sowers, Defendant in Error, being numbered 3596 on the docket of said Court of Civil Appeals, wherein was drawn in question the validity of a statute of or the authority exercised under the United States, and the decision was against its validity, or wherein was draw- in question the validity of

a statute of the Territory of New Mexico, and the judgment of said Court of Civil Appeals being against the validity of said statute, and wherein said Court of Civil Appeals failed to give full faith and credit to the public acts of the Legislature of the Territory of New Mexico as is required by the Constitution of the United States, manifest error hath happened to the great damage of the said Atchison, Topeka and Santa Fe Railway Company, as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days
271 from the date hereof in the said Supreme Court to be then and there held, with the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of April, in the year of our Lord, One Thousand, nine hundred and seven.

[The Seal of the U. S. Circuit Court, San Antonio, Western District of Texas.]

D. H. HART,
Clerk of the Circuit Court of the United States, in and for the Western District of Texas, Fifth Circuit,
By A. I. CAMPBELL, *Deputy.*

April 1st, 1907.

Allowed by
JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, at San Antonio, Texas.

271½ [Endorsed:] The Atchison Topeka & Santa Fe Railway Co. Pl'ff in Error *vs.* Geo. A. Sowers Def't in Error. Writ of Error. Filed in the court of Civil Appeals, at San Antonio, Texas, Apr. 1, 1907. J. Murray, Clerk.

272 *Writ of Error Bond.*

Know all men by these presents: That we, The Atchison, Topeka & Santa Fe Railway Company, as principal, and R. Waverley Smith and B. Adoue, as sureties, are held and firmly bound unto George A. Sowers, in the full and just sum of Fifteen Thousand (15,000.00) Dollars, to be paid to the said George A. Sowers; to which payment

well and truly to be made we bind ourselves, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of March, A. D., 1907.

Whereas, lately, at a term of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, in a suit pending in said Court, being The Atchison, Topeka & Santa Fe Railway Company, appellant, and George A. Sowers, appellee, judgment was rendered against The Atchison, Topeka & Santa Fe Railway Company and in favor of the said George A. Sowers, in cause numbered 3596 on the docket of said Court of Civil Appeals, and the said Atchison, Topeka & Santa Fe Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George A. Sowers, citing and admonishing the said George A. Sowers to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof.

Now, the condition of the aforesaid obligation is such that if the said The Atchison, Topeka & Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and effect.

Sealed and delivered in the presence of

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
By J. W. TERRY, *Its Solicitor,*
R. WAVERLEY SMITH,
B. ADOUE.

Attest:
E. L. COPELAND,
Secretary The Atchison, Topeka and Santa Fe Railway Company.

273 April 1, 1907.

Approved,
JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas.

I, R. Waverley Smith, do swear that I am worth in my own right, at least the sum of Sixteen Thousand ($16,000.00) Dollars, after deducting from my property that which is exempt by the constitution and laws of the state from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in the said State liable to execution worth more than Sixteen Thousand ($16,000.00) Dollars.

R. WAVERLEY SMITH.

Sworn to and subscribed before me this 26th day of March, A. D., 1907. As witness my hand and official seal.

[SEAL.]

M. C. BANKS,
Notary Public, Galveston County, Texas.

I, B. Adoue, do swear that I am worth in my own right, at least the sum of Sixteen Thousand ($16,000.00) Dollars, after deducting from my property that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in the said State liable to execution worth more than Sixteen Thousand ($16,000.00) Dollars.

B. ADOUE.

Sworn to and subscribed before me this 26th day of March, A. D., 1907. As witness my hand and official seal.

M. C. BANKS,
Notary Public, Galveston County, Texas.

274 Endorsed: The Atchison, Topeka & Santa Fe Railway Co., Pl't'ff in error, *vs.* Geo. A. Sowers, Def't in error. Writ of error Bond. Filed in the Court of Civil Appeals at San Antonio, Texas, Apr'l 1, 1907. J. Murray, Clerk.

275 United States of America to George A. Sowers, or his Attys. of Record Patterson & Wallace, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas at San Antonio, Texas, wherein The Atchison Topeka and Santa Fe Railway Company is plaintiff in error and you are defendant in error, said cause being numbered 3596 on the docket of said Court of Civil Appeals, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. H. James, Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, this 1st day of April, A. D. 1907.

JOHN H. JAMES,
Chief Justice.

[Seal Court of Civil Appeals of the State of Texas.]

Attest:

J. MURRAY,
Clerk of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas.

275½ *Marshal's Return, El Paso, Texas.*

This Writ came to hand this the 6th day of April A. D. 1907, and I have executed the same on this the 8th day of April A. D. 1907, by delivering in person at El Paso Texas in my District a true and correct copy of this Writ to George E. Wallace, a member of the Law Firm Patterson and Wallace Attorneys for George A. Sowers.

EUGENE NOLTE,
U. S. Marshal, W. D. T.,
By H. R. HILLEBRAND, *Deputy.*

Marshal's Fees:
Serving copy of Citation $2.00
Returned by registered letter 10¢

[Endorsed:] (Original) The Atchison, Topeka & Santa Fe Railway Co. Pl'ff in Error *vs.* Geo. A. Sowers Def't in Error. Citation in Error. Issued April 1" 1907. J. Murray Clerk.

276 *Assignments of Error.*

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE A. SOWERS, Defendant in Error,

In Error from the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas to the Supreme Court of the United States.

Comes now the Atchison, Topeka & Santa Fe Railway Company, Plaintiff in error, by its attorneys, J. W. Terry and A. H. Culwell, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, to-wit:

I.

277 The Court of Civil Appeals erred in holding that the statutes of the Territory of New Mexico as pleaded by the defendant on the trial of this cause in bar of recovery did not control the rights of the parties herein and that same was not binding upon the courts in the State of Texas.

II.

The Court of Civil Appeals of the Fourth Supreme Judicial Disteict of Texas erred in failing and refusing to decide this case ac-

cording to the statutes and laws of the Territory of New Mexico, which was in force and effect at the time of the accident out of which this suit arose, it being admitted that this accident occurred in the Territory of New Mexico and not in the State of Texas, and laws of the Territory of New Mexico which were in effect at the time of said accident and at the time of the trial of this cause having been properly plead and proved upon the trial of said cause.

III.

The District Court of El Paso County erred on the trial of this cause in failing and refusing to give special charge No. 7 requested by the defendant, which special charge was and is as follows:

"That, under the law of the Territory of New Mexico, pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

And the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in failing and refusing to reverse the judgment rendered in the District Court of El Paso County, Texas, because of the failure and refusal of the Judge of the District Court of El Paso County to give said special charge.

IV.

The Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in failing and refusing to sustain the second assignment of error of this Plaintiff in Error in that court, wherein Plaintiff in Error complained of the action of the trial court in sustaining the demurrer of the plaintiff to the defendant's
278 plea as set forth in its amended answer in which the laws of the Territory of New Mexico were pleaded as a defense to this action, and when it was shown and admitted that no suit had been brought by the plaintiff in the Territory of New Mexico as provided by the laws of said Territory, said laws having been pleaded and introduced in evidence.

V.

The Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in overruling and failing to sustain Plaintiff in Error's 14th assignment of error in that court, which was and is as follows:

"The Court erred in sustaining plaintiff's exception to the defendant's answer, which exception was filed in this cause on the eleventh day of December, 1905, for the reason that the defendant company did not own any line of railway in the State of Texas; that it did own and operate a line of railway in the Territory of New Mexico; that it did have agents in the said Territory of New Mexico upon whom service may be had; that it was shown that the courts held regular sessions in the said Territory of New Mexico, and in the county where said accident occurred, which said courts had jurisdiction of the said matters and things involved in this controversy;

that it had not been shown and was not pleaded that the plaintiff ever brought his suit in the Territory of New Mexico within the time fixed by the act pleaded by defendant, or within any other time; because the act of the Legislature pleaded by the defendant was not a local or special law, but a general law; that the said act so pleaded was not contrary to the organic law of said Territory, because said act so pleaded by the defendant was not contrary to the seventeenth provision of the organic law of the Territory of New Mexico; because said act so pleaded was not in violation of the fifth amendment of the Constitution of the United States, or any other amendment; because said act of the Legislature was not void, was not class legislation, but was and had been held to be such legislation as the Legislature of the Territory of New Mexico might have enacted;
279 because none of the reasons pleaded by the plaintiff in said exception, or any subdivision of said exception, were valid, nor should said exception, or any subdivision thereof, have been sustained."

"Wherefore the court erred in sustaining the plaintiff's said exception to the defendant's answer setting forth the law of New Mexico as pleaded in said answer."

VI.

The Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas erred in failing and refusing to give full faith and credit to the public statutes or laws of the Territory of New Mexico and in holding that said laws were not binding upon the courts in the State of Texas. The Court of Civil Appeals as aforesaid had no right to pass upon the validity of the laws of a sister jurisdiction. At best, the Court of Civil Appeals at San Antonio had only the right to interpret those statutes, and said Court had just as much right to declare an act of the Parliament of the British Empire unconstitutional and invalid as it had to pass upon the validity of a statute of the Territory of New Mexico pleaded in defense in this cause by the Plaintiff in Error. This case ought to have been tried according to the laws of the Territory of New Mexico, and it was the duty of the court trying this cause to enforce those laws when same were properly called to its attention, and failure to do so was a denial of one of the rights guaranteed by Section 1, Article 4 of the Constitution of the United States.

Respectfully submitted,

J. W. TERRY,
A. H. CULWELL,
Attorneys for Plaintiff in Error.

Endorsed: The Atchison, Topeka & Santa Fe Railway Co., Plaintiff in Error, *vs.* Geo. A. Sowers, Def't in Error. Assignments of error. Filed in the Court of Civil Appeals at San Antonio, Texas, Apr. 1, 1907. J. Murray, Clerk.

280 *Cost Bill in Court of Civil Appeals, San Antonio, Texas.*

No. 3596.

A. T. & S. F. Ry. Co., Appellant,
vs.
Geo. A. Sowers, Appellee.

Record Filed April 2, 1906. How Decided—Affirmed.

Names of Principals: Atchison, Topeka & Santa Fe Ry. Co.
Names of Sureties: A. Kohlberg, J. J. Mundy.
Disposed of Jan'y 16, 1907.
Opinion by Fly, A. J.

From El Paso County.

Filing Record	$.50
Docketing Cause	.50
Appearances	1.00
Filing Briefs and Other Papers	2.30
Notices	4.50
Orders	2.00
Judgment	1.00
Recording Opinion	3.50
Certificate with Seal	.50
Taxing Cost	.50
Certified Copy Bill of Costs	1.00
Filing and Docketing Motion	.35
Precept	1.00
Making Certified Copy of Motion	5.00
Sheriff's Fees	1.00
Transcript to Supreme Court	1.50
Express Charges to and from Supreme Court	.60
Costs in Supreme Court	7.00
Cash paid Clerk Supreme Court copy application	5.00
Cash paid United States Marshall serving citation	2.10
Transcript to Supreme Court United States	140.00
Total	$180.85

The State of Texas:

I, Jos. Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing Bill of Costs, for the Sum of One Hundred and Eighty and eighty-five one-hundredths Dollars, is true and correct.

Given under my hand and seal of office, this the 10th day of April, A. D. 1907.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY, *Clerk.*

281 *Certificate.*

STATE OF TEXAS:

I, Jos. Murray, Clerk of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, do hereby certify that the foregoing pages contain a full, true and correct transcript of the record and of all papers filed and proceedings had together with original writ of error & citation as shown on pages 269 & 275 respectively in cause No. 3596, Atchison, Topeka & Santa Fe Railway Company, Appellant, *vs.* George A. Sowers, Appellee, appealed from the District Court of El Paso County, as the same appear upon file and upon record in my office.

In Testimony Whereof I have hereunto set my hand with the seal of said Court, this the 11th day of April, A. D. 1907.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals,
Fourth Supreme Judicial District of Texas.

282 [Endorsed:] No. 3596. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. A. T. & S. F. Ry. Co. *vs.* Geo. A. Sowers. J. Murray, Clerk.

Endorsed on cover: File No. 20,674. Texas court of civil appeals, fourth supreme judicial district. Term No. 286. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, *vs.* George A. Sowers. Filed April 22d, 1907. File No. 20,674.

In the Supreme Court of the United States, October Term, 1907.

No. 286.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

GEORGE A. SOWERS, Defendant in Error.

STIPULATION FOR ADDITION TO RECORD.

Certiorari in the above styled and numbered cause is hereby waived and it is agreed that the certified copy of so much of appellant's brief in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, as pertains to the 12th, 13th and 14th assignments therein stated, together with the propositions, authorities, statements, and argument thereunder, which certified copy is hereto attached and marked Exhibit "A" for identification, together with a certified copy of the argument pertaining to said assignments of error that was presented by appellant on its motion for rehearing filed in said Court of Civil Appeals and marked Exhibit "B" for identification, may be and same is hereby considered as a part of the record herein, same to be considered in connection with the printed transcript of the record now on file in this cause. Said certified copies, together with this agreement, may be filed direct in the Supreme Court of the United States and notice of the filing thereof is hereby waived.

J. W. TERRY,
A. B. BROWNE,
GARDNER LATHROP,
Attorneys for Plaintiff in Error.
GEO. E. WALLACE,
Attorneys for Defendant in Error.

EXHIBIT "A."

Twelfth Assignment of Error, as a Proposition.

(Original No. 10.)

The court erred in refusing to give defendant's special charge No. 7, as follows: "That under the law of the Territory of New Mexico, pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

Because the same was the law in the case, and was not incorporated in the court's main charge, and because same was called for by the evidence introduced herein, and therefore said special charge should have been given.

First Additional Proposition Under This Assignment.

Under the laws and Constitution of the United States, it is the duty of the courts of one State to give full faith and credit to the public acts, records and judicial proceedings of every other State or Territory, and it having been shown to the court that there was a public act in the Territory of New Mexico controlling and governing suits and actions of this character, it was the duty of the court trying this case to give full force, faith and credit to the same, and to enforce the provisions thereof.

Authorities.

Article 4, Section 1, Constitution of the United States.
Revised Statutes of the United States, Section 905.
Glenn *v.* Garth, 147 U. S., 367.
Buttron *v.* El Paso & Northeastern Railway Co., 15 T. C. R. 339.

Second Additional Proposition Under This Assignment.

The several States and Territories have the undoubted right to regulate by law the relations between employers and employés within their borders, and to fix by legislative enactment the liabilities of the former for the acts and negligence of the latter, and the Territory of New Mexico had the right to fix by legislative enactment the rights and duties of employer to employé, and *vice versa*, and to provide the mode of procedure for the enforcement of such rights, and the action of the Legislature of the Territory of New Mexico in this regard cannot be nullified by the courts of another State.

Authorities.

Southern Pacific Co. *v.* Schoer, 114 Federal Reporter, 467, and authorities there cited.

Third Additional Proposition Under This Assignment.

The Courts of one State may not pass upon the validity of a statute of another State or Territory, but at best they are only permitted to place a construction. Such Courts are not authorized to declare such statutes null and void, unless by doing so they are following the construction and precedent established by the court of last resort in the State or Territory where the legislation was enacted, and in this case, it not appearing that the court of last resort in the Territory of New Mexico had declared the statute in question null and void, the courts in Texas have no right to so do, but such latter courts must assume that the legislation in question is regular and valid.

Authorities.

Glenn *v.* Garth, 147 U. S., 369, and authorities there cited.

Statement Under All of Above Propositions.

Special Charge No. 7, set out in this assignment, was asked and refused. (Tr. p. 27.) The Legislative Assembly of the Territory of New Mexico, on March 11th, 1903, passed an act which required in direct terms that suits of this character must be instituted, and could only be instituted in the Territory of New Mexico, and fixing the venue thereof. (Record, 195.) This act was likewise pleaded by the defendant in bar of this suit. It is not pretended that the plaintiff complied with the provisions of this law, but the same was wholly ignored by the trial court. Plaintiff served notice upon the railway company of his claim, details thereof, and gave a list of the witnesses. This was done on the 29th day of June, 1905, by serving the notice upon the agent of the defendant at Gallup, N. M. (Record, 108-110.)

Remarks.

The propositions under this assignment in brief is the argument of appellant on this phase of the case. By reference to the action of the court on the special exceptions interposed by the plaintiff to the answer of the defendant, setting up this act of the Legislature of New Mexico, you will find that the District Judge assumed the authority, and actually declared the law of its sister Territory unconstitutional and void, and following this position, special charge under consideration was refused. We once heard of a justice of the peace who assumed the authority and actually sentenced a man to confinement in the penitentiary, but this is the first instance that has come under our observation where a district judge has assumed the right to declare the solemn legislative acts of another State or Territory absolutely void. It is only by reason of the spirit of comity largely which would ever permit a litigant to maintain an action in one State on a cause of action originating in another, and it is the universal rule, as we understand it, that where these actions are maintained they must be enforced, and the rights of the litigant determined, by virtue of the law of the forum where the cause of action has accrued. Primarily the State of Texas and the courts in Texas were not interested in the differences which arose between the plaintiff and defendant in this case, and why should the courts in Texas be interested in this subject matter? The plaintiff was a citizen, not of Texas, but of the Territory of New Mexico; he was earning his livelihood at that time in such Territory; he was injured in that jurisdiction, and he was charged with a knowledge of the laws of that country at the time he asked the protection of its laws by becoming a citizen thereof. Obedience to the laws of a given jurisdiction is always assumed by any man who lives in that jurisdiction, and a railway employé assumes the risks provided by the laws of the place of his employment. Sowers was charged with a knowledge of the requirements incumbent upon him in case of a personal injury in New Mexico before he was injured, and by accepting that employment he said in effect to the authorities

and to the railway company that I submit myself to an obedience of the laws of this Territory. This is further emphasized by the fact that the plaintiff began to comply with the act of the Legislature of New Mexico in question, because it is shown that he served upon the agent of the company the notice and affidavit required in Section 1 of that act; he thus had personal knowledge of the law in question. It is only by indulging in surmise that we can conclude why the suit was not brought there, and any statement from me as to why it was not so brought would be outside of the record, and could have no proper place herein, although it is a matter of common knowledge, as is stated practically in the preamble to the act of the Legislature of New Mexico, and we might conclude that the atmosphere in that jurisdiction was not conducive to the success he might hope to attain in another jurisdiction, and hence the courts in Texas have been made a dumping ground. I believe largely in the old maxim that every hen should feather her own nest.

The Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and public acts in that section mean, of course, legislative acts. This Constitution is the supreme law of the land, and full faith and credit, as used therein, is not merely directory, but is mandatory. Following this article of the Constitution, and as giving moral weight to the interpretation of the same which we have invoked, it is provided in Section 905 of the Revised Statutes how the acts of the Legislatures of any State are to be introduced in evidence in the courts of another State. This section requires that these acts of other States shall be admitted in evidence in the courts of another State, but what good is it going to do to admit an act of the Legislature in evidence and then totally ignore the same, as was done in this case? It has been often decided that the courts of one State may place a construction upon the legislative acts of another State, and that they have the right to construe for themselves such acts in the absence of a construction placed thereon by the highest court in the State where the legislation was enacted. It is also a primary rule that every intendment will be indulged in favor of the regularity and validity of a legislative enactment, and in the absence of a certain holding by the court of last resort in that State, it is the duty of the courts of a sister State to assume that the legislation in question was not only regularly passed, but that same accords with the constitutional provisions of the State that passed the Act. There is another well established rule that the Legislatures of all States have the right to regulate their internal affairs and the conduct of their citizens. Every State has the right to declare certain things illegal and unlawful so long as such legislation is general in character. The States have the right to impose duties and burdens upon the master for the protection of the servant. They likewise have the unquestioned right to direct the duties of the servant to the master. Now, the act of the Legislature of New Mexico in question did not destroy any right that this plaintiff had; it merely affected the

remedy; it merely directed as to the forum where the right should be enforced primarily, and in the absence of all law this plaintiff would not have had a cause of action against the railway company. He had no inherited right to bring this suit at any particular place or at any particular time, and under the rule of law laid down in the Schoer and other cases that Legislature had the unquestioned right to adopt such rules and regulations as it deemed proper as fixing the rights of the plaintiff and defendant in this action. The legislation in question was passed upon by this court in the Buttron case, which authority, we think, is practically conclusive. The Supreme Court denied a writ of error in that case.

Thirteenth Assignment of Error as a Proposition.

(Original No. 14.)

The court erred in sustaining the demurrer of the plaintiff to defendant's plea, set forth in its amended answer, in which the laws of the Territory of New Mexico were pleaded as a defense to this action, when it was shown and admitted that no such suit had been brought by the plaintiff in the Territory of New Mexico, as provided by the laws of said Territory, said laws being fully pleaded and introduced in evidence.

Additional Propositions Under This Assignment.

Same as those stated under the twelfth assignment, which are presented under this one without the necessity of repetition.

Statement.

The defendant pleaded Chapter 33 of the Acts of the Thirty-fifth Legislative Assembly of the Territory of New Mexico, passed March 11th, 1903, entitled, "An Act Establishing the Law and Procedure in Certain Cases." (Tr. p. 9.) The act is set out in full in stenographer's record, pages 195-200. The plaintiff excepted to the answer of the railway company setting up this law, said exceptions being several in number, but all attacking the validity of the act in question. (Tr. pp. 15-16.) The trial court sustained each and all of these exceptions, and held that the act was void (Tr. p. 18*a*), and struck out answer pleading that this accident occurred in the Territory of New Mexico.

Authorities.

Same as those stated under twelfth assignment.

Argument.

What has been said under the twelfth assignment will apply with equal or greater force under this one. The trial court held that the

act in question was unauthorized and in violation of the act of Congress creating the Territory of New Mexico, because same had not been submitted to Congress for approval, because same was a special law, because same was contrary to the organic law of New Mexico, because same was in violation of Section 17 of the organic law of that Territory, because same was in conflict with other acts of that Territory. The Court also held that it was in violation of the fifth amendment of the Constitution of the United States, likewise that it was class legislation, and also that it was in violation of the fourteenth amendment of the Constitution of the United States. This court, in the Buttron case, cited under the twelfth assignment, decided each of these questions adversely to the contention of appellee, and we do not deem it necessary to indulge in an extended argument. The court has disposed of the entire question, and having done so, we assume that it will be held that the trial court was in error in sustaining these exceptions.

Fourteenth Assignment of Error, as a Proposition.

(Original No. 15.)

The court erred in sustaining plaintiff's exception to the defendant's answer, which exception was filed in this casuse on the 11th day of December, 1905, for the reason that the defendant company did not own any line of railway in the State of Texas; that it did own and operate a line of railway in the Territory of New Mexico; that it did have agents in the said Territory of New Mexico upon whom service may be had; that it was shown that the courts held regular sessions in the said Territory of New Mexico, and in the county where said accident occurred, which said courts had jurisdiction of the said matters and things involved in this controversy; that it had not been shown and was not pleaded that the plaintiff ever brought his suit in the Territory of New Mexico within the time fixed by the act pleaded by defendant, or within any other time; because the act of Legislature pleaded by the defendant was not a local or special law, but a general law; that the said act so pleaded was not contrary to the organic law of said Territory, because said act so pleaded by the defendant was not contrary to the seventeenth provision of the organic law of the Territory of New Mexico; because said act so pleaded was not in violation of the fifth amendment of the Constitution of the United States, or any other amendment; because said act of the Legislature was not void, was not class legislation, but was and had been held to be such legislation as the Legislature of the Territory of New Mexico might have enacted; because none of the reasons pleaded by the plaintiff in said exception or any subdivision of said exception, were valid nor should said exception, or any subdivision thereof, have been sustained.

Wherefore, the court erred in sustaining the plaintiff's said exception to the defendant's answer setting forth the law of New Mexico as pleaded in said answer.

Statement.

Same as under twelfth and thirteenth assignments.

Appellant presents the additional propositions under this assignment which it has stated under its twelfth assignment.

Authorities.

Same as under twelfth assignment.

Appellant asks that judgment of the lower court be reversed and cause here rendered, or, if the court should conclude that it ought not render judgment, appellant asks that judgment of the lower court be reversed and cause remanded.

Respectfully submitted,

J. W. TERRY,
A. H. CULWELL,
Attorneys for Appellant, Atchison, Topeka & Santa Fe Railroad Company.

* * * * * * *

Certificate.

SAN ANTONIO, TEXAS, *October* 2, 1907.

I, Jos. Murray, Clerk Court Civil Appeals in and for Fourth Supreme Judicial District of Texas, do hereby certify that the above and foregoing eight pages contain a true and correct copy of appellant's brief in cause No. 3596, styled A. T. & S. F. Ry. Co., appellant, *vs.* George A. Sowers, appellee, appealed from District Court of El Paso County in so far as said brief pertains to the 12th, 13th., and 14th. assignments of error and as the same appears upon file among the papers in said cause now on file in my office.

In testimony whereof I have hereunto set my hand with the seal of said Court, this the 2nd day of October, A. D. 1907.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY, *Clerk.*

[Endorsed:] No. 3596. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. A. T. & S. F. Ry. Co., Appellant, *vs.* Geo. A. Sowers, Appellee. Certified copy assignments from brief of appellant. J. Murray, Clerk.

EXHIBIT "B."

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant,

vs.

GEORGE A. SOWERS, Appellee.

Argument in Support of Motion for Rehearing.

After a careful reading of the opinion rendered in affirmance of the judgment in this case, we have been forced to the conclusion that your Honors thought that we had presented a cause possessing so little of merit as to properly subject us to your criticism; that although we stand charged with the payment of and demand for a large sum of money that we should not present our grievance in your Court, unless our assignments present questions admitting of no doubt as to their soundness. It has never been our desire to trifle with any of the Courts in this State nor to unduly harass them, and in presenting our briefs herein, with its numerous assignments, we felt that under the constitution, laws and rules of practice in this state that we were justified in stating our position as frankly as possible, leaving the determination of the issue between the litigants to those constituted under the law with the determination thereof; assuming, of course, that these various questions would be determined on a sound judgment or upon precedent and if the court had in mind, when this opinion was written, that we were merely consuming time, seeking delay and that we ought to have known better, we, at least, desire now to disavow any such intent upon our part. A lawyer is likely to be wrong in any opinion expressed and we shall never complain *of* the Courts of last resort shall finally determine that our case is wrong; but our assignments were presented, as we hope you will conclude, with the utmost sincerity upon our part and in the candid belief that at least some of them are well taken, and with your indulgence, we desire now to discuss those which to us seem unanswerable.

Under our fifth assignment we complained of the action of the trial court in giving the portion of its seventh paragraph to the jury, which is set out in the assignment. We did not complain of all of that paragraph but only so much of it as was necessary to make a complete sentence and which at least indicated to us that the same was both misleading and a plain invasion of the province of the jury. We fear, in this connection, that the Court has been misled as to the true import of this charge, if the charge as copied in your opinion, is what you deem to be the charge that was actually given by the Court. In our assignment we state a complete sentence as taken from the Court's original charge, whereas — you have copied this charge in the opinion there is this distinction, that at the close of this section of the Court's charge, as stated in our assignment, there is a period, but as written in your opinion, there is merely

a semicolon, indicating that the sentence was not complete. You can readily see that there is a vast difference in this charge if you substitute a period in the place of a semicolon at the close of the line reading "constitute negligence upon the part of the defendant railway company." Suppose you put a period there and begin the next line with a capital letter and such is the exact condition of this charge as written by the Judge trying the case as given to the jury, and in this connection we here now state this charge as same is written and contained in our brief; that there is a period at the end of the sentence "constituted negligence upon the part of the defendand railway company" and that the next line begins with a capital or a new sentence, and if the transcript in this case is not so prepared, we say that the same is not a correct reproduction of the original record and we ask for a certiorari to complete the record or correct the record in this behalf or that the Court order the original charge sent up. Assuming that we are correct, we append hereto an exact copy of the entire section of the seventh paragraph of the Court's charge which bears out our contention, marking same Exhibit "A" to this argument.

Assuming, therefore, that we are correct as to how this question was presented in the lower court, it seems to us that same was plainly a charge upon the weight of the evidence, at least that portion thereof complained of in our assignment. The Court enumerated certain issues of fact and plainly stated that if those were found to exist affirmatively that they constituted negligence upon the part of the defendant railway company. As to what the intention of the trial judge was in preparing this charge is not for us to say. We do contend, however, that a man of ordinary intelligence, especially if he was not a lawyer, could do nothing else than to conclude that if that jury found that the railway company permitted its road bed or track to become soft or out or repair so that the point of the rail dropped as low as the engine in passing over it or dropped down so that the pilot came in contact with or struck a frog that we are absolutely responsible; that the Court gave them positive direction that if they found those things to be true that they did constitute negligence upon the part of this company. We need not cite authorities in support of the contention that it is error for the court to tell the jury that any given state of facts constitutes negligence unless made so by a statute law and there is or was no statute law making it negligence upon the part of the railway company to maintain a soft track or to do any of the other things enumerated in this section of the charge. We, therefore, ask that if the transcript in this case does not contain this charge as herein presented that you order the record perfected so that this question may be fully presented as the facts really exist.

We likewise complain of the action of this Court in the consideration given to our 12th, 13th and 14th assignments, each of same dealing as they do with a statute of the Territory of New Mexico plead in defense of this action. By these various assignments we present the question both by the action of the trial court in overruling our plead to be sued in New Mexico; to its action in sustain-

ing a demurrer to that portion of our answer setting up this statute by way of defense, as well as the refusal of the trial court to give a special charge presenting the law of the jurisdiction wherein this cause of action arose. It is not for us to indulge in any homily as to the wisdom of this legislation or what prompted the legislature of that jurisdiction to enact such a law, neither do I believe it is our province to inquire into that subject, relying as we do upon the sound principle that it is the duty of the court of one state to give full faith and credit to the legislative acts of a sister jurisdiction. By your opinion in this case you have denied to the litigant this constitutional right. You have with one stroke of the pen apparently struck down a solemn legislative act of the Territory of New Mexico admitting, as you do, at the same time that you have found neither authority nor precedent for such a course. You call it an in-quitious statute and say that the same is null and void and it shall be our endeavor herein to cite authorities from the highest judicial tribunals on this earth in support of the proposition that that Territory had the undoubted right to pass that law and that the Courts in this State must respect it. You may have the right to place a construction upon the statutes of a sister state but *you have no right to sit in judgment upon the validity of such a statute.* There is no question of the construction of a statute involved in this suit. It is plain and unambiguous and the record in this case abundantly shows that appellee violated its plainest terms. It is true that in the Buttron case you did not pass upon all of the provisions of this statute but you did pass upon enough of them that a practitioner had the right to conclude that at least your court would never hold that you had the constitutional right to declare the statute law of another state unconstitutional. The Constitution of the United States declares that full faith and credit must be given by one state to the public acts, etc. of another and this has been held to include the territories as well. We ask that you read, in this connection, Allen *v.* Alleghany Company, 196 U. S. 311. C. & A. Railroad *vs.* Wiggins Ferry Company 119 U. S. 622. Glenn & Garth 147 U. S. 360. B. & P. Railroad *vs.* Hopkins 130 U. S. 221, B. & O. Railroad *vs.* Baugh 149 U. S. 372. All of these cases announce the doctrine which is founded on the Constitution of the United States that where it is shown that one state court has refused to give full faith and credit to the legislative acts or judicial decrees of another state, that a federal question is then raised which will give the Supreme Court of the United States jurisdiction of the cause. This is so because of the refusal of a state court to do that which is required under the Constitution. You have the right to place an interpretation upon the laws of a sister state but you have not the right to repudiate in toto its legislation and declare the same null and void, in the absence of such a holding from the court of last resort in the state where the act was passed, and there is a presumption that the acts of a legislature are constitutional and assuredly they should be enforced until declared null and void by a proper tribunal. Under what theory did Sowers have the right to appeal the courts of Texas and ask to have this cause of action adjudicated here? He was not even a citizen of this State; the

accident occurred in the Territory of New Mexico, and if we have up to this moment read the decisions aright his cause of action if permitted to be maintained here must be tried according to the law of the place where the cause of action arose: The railway company as to him committed no act of negligence in the State of Texas; it incurred no liability in this state; it violated none of the laws of this state; it had no contract with him that was being performed at that time in this state, and if you assume jurisdiction certainly the rights of the parties must be determined by the laws of the Territory of New Mexico at the time of the transaction. We fear that your Honors in passing upon this question have confounded the question of *jurisdiction* with that of *right of action*. The question of jurisdiction now presented is not up for determination. Our contention at this time is that under the laws of New Mexico this man had no cause of action and that you can not give to him in Texas a cause of action and create in his favor a right which he did not possess under the laws of New Mexico. The very first section of the act of New Mexico in question declares that there shall be no right of action nor civil liability either under the common law or any statute for personal injuries unless certain things are done by the injured party to fix the right, and it affirmatively appearing that those things were not done, then under the laws of New Mexico this man had no cause of action at all. Assuredly New Mexico had the right to pass such statutes of limitation as it saw fit. It has done so and assuming, as we will, that it is yet the law in Texas that the rights of the parties must be determined by the laws in force at the time and place of the occurrence, then the courts in this state and at best had nothing to do but to enforce that law as it found it; so that the question of jurisdiction in Texas is not so much involved as is that of the right of this man to maintain an action at all. Suppose that this had been a land suit filed in Texas for the title to land in New Mexico, this man claiming the land as an heir and in accordance with the laws of descent and distribution in Texas, but suppose it had developed that there was a different statute in New Mexico on descent and distribution which disposed of a deceased person's property in a different way to that in which it would have been disposed of under the laws of this state, this property all being situated in New Mexico, do your Honors mean to say that you would notwithstanding that law try this case and adjudicate the rights of these parties according to the laws of Texas, or would you not be required, under article four of the Constitution of the United States, as well as the precedent by a long line of authorities, to adjudicate the rights of these parties as per the law of New Mexico? You seem to lose sight of the proposition that this man had no inherent right to sue in Texas at all on this cause of action and that it is only by reason of the comity existing between the states that the courts in this state were even permitted to entertain jurisdiction. There is the further problem presented which has been adjudicated a number of times in Texas, that where a suit is maintained in one state to enforce a right accruing in another, that the courts in this state will not undertake to adjudicate those rights under statutes so materially different from

the law of this state in relation to the same subject but will refuse to entertain the cause of action at all. Now the law of New Mexico on the subject under discussion is materially different to the law of Texas on the same subject and if precedent is worth anything our plea setting up this fact ought to have been sustained. You could not in this state properly try a cause of action depending for its standing upon a statute which was so materially different as that under consideration. Please see Mexican National Railway *vs.* Jackson 89 Texas 107. Railway Company against McCormick, 71 Texas 660, and in this McCormick case, which was a suit by a widow for the death of her husband, it was distinctly held that if the cause was maintained at all here, it must be maintained under the laws of Arkansas where the accident occurred, and that the statutes of the two states were so materially different that the courts here could not undertake to enforce the Arkansas statute and hence denied the right to bring the suit here. The same thing was held in Railway Company *vs.* Richards, 68 Texas 375, and your court in the case Thomas *vs.* Western Union Telegraph Co. 2 T. C. R. 133 held that there could be no recovery of mental anguish in Texas on a cause of action which arose in a state in which no such recovery was permissible and in so holding, what were you doing at the time, you were simply giving full faith and credit to the public acts of a sister state as you should have done. You were not endeavoring to enforce any statute law or other right of recovery in Texas but you were, by reason of the comity existing between the states, enforcing the rule of another state; you were practically doing the same thing when you sustained the judgment in the Buttron case wherein certain sections of this same statute were under discussion. I recognize the rule that a suit for personal injuries is a transitory action and may be maintained any where that the defendant can be found, provided the rights of the parties are enforced as they would have been enforced had the cause of action been maintained in the state where the cause of action accrued, and provided further that the remedy to be enforced in that state is not so materially different as to that enforced here, it would be impossible for the courts of this state to do so. In the absence of all law upon the subject, Sowers had no inherent right of action against any one for the injury sustained and it was held in the case of Southern Pacific against Schoer 114 Federal 470, that the several states had the right to enact and enforce such laws as seemed proper, fixing the relations between employers and employed; so that I take it that the legislature of New Mexico had the right to fix the relation between Sowers and this railway company, that is, to limit or extend the rule of the liability of a master to the servant. It is not necessary in the determination of this case to go further than to consider the first article of the statute under consideration wherein it is declared that no cause of action shall exist in a case like the one at bar. This is the declaration of this act. It goes to the foundation of the transaction; it involves more than the jurisdiction of a Texas court; it fixes the status of these parties and I cannot understand how a liability can be created in Texas on a cause of action that did not accrue in this state different from what the cause of action would

have been if the suit had been maintained in the other state. This question has been determined in another way even by the Supreme Court of this state. Take for instance the statutes of this state which declares that a foreign corporation cannot maintain a suit here unless it gets a permit to do business. Now suppose such a foreign corporation, without the necessary contract, undertook to enforce a Texas contract in some other state the rights of the parties become fixed under the Texas statute. We say again that the question of jurisdiction is not so much involved as that of the right of the party to maintain the action at all, not only in Texas, but in New Mexico. This man could not maintain this suit even in the jurisdiction where the accident occurred. Then we think it preposterous to declare that he could maintain such a suit in this state. You may say, as you have said, that the statute under consideration was iniquitous. I expect the courts in New Mexico might properly say that a good many of our statutes are iniquitous. I am inclined to think that some of them are, but because they are iniquitous does not authorize us to overturn the Constitution of the United States. This question when a given thing is iniquitous is largely a question of taste. There is certainly no fundamental principle involved in the declaration.

We cannot assert our position too strongly that you were in error in deciding this case on the theory that the legislature of New Mexico could not pass a statute seeking to fix the jurisdiction of the courts in Texas. It is not a question of jurisdiction but is a question as to whether a right to maintain the action at all exists. This question must be determined by the law of New Mexico and it is only your province to interpret that law and not to pass upon its validity. You also declare that they could not pass any statute which would prevent a citizen from using our courts to secure the enforcement of a right and may I ask what right did Sowers have in this transaction. To us it seems that there can be but one answer, *he had only the right to the enforcement of such rights as were secured to him under the laws of New Mexico.* The State of Texas owed him nothing in this behalf. Our courts were merely open to him as a matter of courtesy and by engaging in the service and subjecting himself to the jurisdiction of the laws of New Mexico at the time of this accident he assumed all the risks and incurred all of the responsibilities which its laws imposed. This statute was one of them.

We ask again that you give this matter further consideration.

Respectfully submitted,

J. W. TERRY,
A. H. CULWELL,
Attorneys for appellant, Atchison, Topeka & Santa Fe Railway Company.

Since writing the above argument, we have had access to the transcript on file in this court and find that the 7th paragraph of the Court's charge which is complained of in our fifth assignment is not correctly copied or rather punctuated in your Honor's Opinion.

There is a period at the close of the sentence "constituted negligence on the part of the defendant railway company" and the next line is a new sentence beginning with a capital letter as we contended in the above argument was *as* the way the same appeared in the court's original charge, it will, therefore, not be necessary for us to have the record perfected in any respect. We will not attach a copy of the Court's charge as an exhibit as stated in the argument for the reason that it is not necessary. Please see transcript page 20 for the 7th paragraph of the Court's charge.

J. W. TERRY,
A. H. CULWELL,
Att'ys for Appellant.

Certificate.

SAN ANTONIO, TEXAS, *Oct. 2nd*, 1907.

I, Jos. Murray, Clerk Court Civil Appeals, in and for Fourth Supreme Judicial District of Texas, do hereby certify that the above and foregoing nine pages contain a true and correct copy of appellant's argument in support of motion for rehearing in cause No. 3596, styled A. T. & S. F. Ry. Co., appellant, *vs.* George A. Sowers, appellee, appealed from District Court of El Paso County, as the same appears upon file among the papers in said cause, now on file in my office.

In testimony whereof, I hereunto set my hand with the seal of said Court this the 2nd day of October, A. D., 1907.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY, *Clerk.*

[Endorsed:] No. 3596. A. T. & S. F. Ry. Co., *vs.* George A. Sowers. Certified Copy of Argument in suuport of Motion for rehearing.

286, 20,674.

[Endorsed:] File No. 20,674. Supreme Court U. S. October Term, 1907. Term No. 286. Atchison, Topeka & Santa Fe Railway Co., P. E., *vs.* George A. Sowers. Stipulation of counsel and addition to record. Filed Oct. 12th, 1907.

No. 286.

In the Supreme Court of the United States

The Atchison, Topeka and Santa Fe Railway Company,
Plaintiff in Error.

vs.

George A. Sowers,
Defendant in Error.

In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted by George A. Sowers against the plaintiff in error August 1, 1905, in the District Court of El Paso County, Texas, for damages growing out of personal injuries alleged to have been sustained by him while employed as a brakeman in the service of the plaintiff in error in the Territory of New Mexico.

Verdict and judgment in favor of the defendant in error was rendered on December 15, 1905, for the sum of $5000.00. An appeal was taken to the Court of Civil Appeals of the State of Texas for the Fourth Supreme Judicial District, where, by a

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written opinion filed December 19, 1906 (Rec. 151), the judgment was affirmed. A motion for rehearing made by the plaintiff in error was overruled (Rec. 162). Plaintiff in error's petition for writ of error, addressed to the Supreme Court of the State of Texas was refused on March 13, 1907, and on April 1, 1907, a writ of error from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, which court had rendered the final judgment herein, was allowed by the chief justice of the court (Rec. 207). Many questions were presented on the trial of this case in the District Court of El Paso County, as well in the Court of Civil Appeals and in the Supreme Court of the State of Texas, but the issues as made by the pleadings, in so far as they affect the cause at the present time, are substantially as follows:

The defendant in error Sowers in his amended petition, which was presented in the District Court of El Paso County charged, that while working as a brakeman, on or about the thirtieth day of April, 1905, while in the discharge of his duties as such, in the railway yards of the plaintiff in error at Gallup, New Mexico, he was injured while riding on the pilot of an engine in the yards, which injury he alleges was occasioned by the negligence of the plaintiff in error in permitting its track to become soft and out of repair and because of low joints in the track, by reason of which the engine pilot struck a frog and guard rail and plaintiff was injured. The plaintiff in error interposed by way of plea in abatement a certain statute of the Territory of New Mexico, known as Chapter 23 of the Acts of the Thirty-fifth Legislative Assembly of the Territory of New Mexico passed on March 11, 1903, which act will be specifically set out in this statement. Plaintiff in error also interposed said legislative Act in bar of any recovery herein. To this pleading the defendant in error Sowers interposed six special exceptions and asked to have the answer setting up said act of the Territory of New Mexico stricken out. The exceptions were, in substance, as follows:

That the same was not applicable in this case for the reason that the plaintiff was never a citizen of the Territory of New Mexico, and that the defendant did not have and maintain its

principal office or its general office in the Territory of New Mexico; that said plea should be stricken out because the law itself was null and void and was not binding on the court and that same was unauthorized and in violation of the Act of Congress of the United States of America creating and establishing the Territory of New Mexico, because said Act was not submitted to Congress for approval and because said Act is a local and special law which attempts to regulate the practice in the courts of justice in the different states in the Federal Union, and because said Act is a special law and contrary to the organic law of the Territory of New Mexico, and because said Act is in violation of Section 17 of the organic Act of the Territory of New Mexico which provides that the Constitution and all laws of the United States which are legally applicable shall have the same force and effect in the Territory of New Mexico as elsewhere in the United States, and because it was in conflict with Article 2871 of the statutes of the Territory of New Mexico, which provides that the common law, as recognized in the United States, shall be the rule of practice and decision in that territory.

The answer pleading this Act was also excepted to on the ground that the Act was in violation of the Fifth Amendment of the Constitution of the United States and also because it was an attempt to change and abridge the settled principle of the law of the land and take away from the plaintiff the right of a transitory action, guaranteed by the Constitution of the United States. The further exception was interposed on the ground that the Act was null and void as being in violation of the Fourteenth Amendment of the Constitution of the United States.

Each and all of the special exceptions to the answer of the railway company, as above set out, were by the trial court sustained (Rec. 13), and the answer of the railway company interposing the Act of the Territory of New Mexico in defense of this action was stricken out.

On the trial of this cause, the railway company requested the Court to submit to the jury the law of the Territory of New Mexico and to require a verdict for the railway company, because

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compliance with the statute in question had not been shown by the plaintiff, which was by the Court refused. (Rec. 21).

It was shown on the trial of this case that at the time of the accident complained of, there was a law in the Territory of New Mexico known as Chapter 23 of the Acts of the Thirty-fifth Legislative Assembly of New Mexico, which Act reads:

"An Act establishing the law and procedure in certain cases, passed March 11, 1903. Whereas, it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the courts thereof.

"Therefore, be it enacted by the Legislative Assembly of the Territory of New Mexico:

Section 1. "Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this territory who is authorized to administer oaths in which the affiant shall state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries in so far as the same may be known to affiant, the way or manner in which such injuries were caused in so far as the affiant has any knowledge thereof, and the names and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such time be known to affiant, and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the District Court of this territory

in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business, and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the Court, it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided.

"Sec. 2. Whenever any person or corporation shall file a petition in the District Court of this territory for the county in which said petitioner lives, or, if a corporation, in the District Court for the county in which such corporation has its principal place of business, stating in effect that such petitioner is informed and believes that some party named in such petition claims that he is entitled to damages from said petitioner for personal injuries, inflicted in this territory upon the party named in said petition or for personal injuries inflicted upon or death caused to some other person for which such party claims to have a cause of action against said petitioner, and stating as near as may be the general character of such injuries and the manner and date said party claims they were inflicted and the place where he claims they were inflicted as near as petitioner knows or is informed as to such facts, and praying that the said party may be required to appear in said court and file therein a statement of his cause of action in the form of a complaint against said petitioner, summons shall issue out of said court and be served and returnable as other process, commanding and requiring the said party named in said petition to appear in said court and file such statement in the form of a complaint against said petitioner, if he has to make, and upon such complaint being filed by such party as required, the defendant named therein may demur to or answer the same and such further pleading had as the parties may be entitled to or as may be meet

proper as in other cases of a similar character, and from
thereafter such further proceedings shall be had in such
as in other cases and the same shall be determined upon
and final judgment subject, however, to appeal or
person, shall be rendered therein either for the petitioner
said complaint or for the adverse party, and if the Court
the petitioner guilty of any of the wrongs, injuries or
complained of against him in said statement, such
shall be assessed against the said petitioner as the
the facts may require, in the same manner as though
had been instituted by the filing of said statement
complaint.

event said party complained of in said petition, after
duly served with such summons, shall fail or refuse to
or file his said statement as required herein, judgment
rendered by default against him in favor of the petitioner
other cases, and thereupon the Court shall try and deter-
the issues raised by such petition including the question
whether or not the petitioner is liable to said party on ac-
of any of the matters or things stated in said petition in
of money whatsoever, and if so, in what amount, and
judgment shall be rendered in accordance with the facts and
, and such judgment as the Court may render shall be
and conclusive upon the question of the liability or non-
of said petitioner to said party, and of the amount of
liability.

It shall be unlawful for any person to institute, carry
maintain any suit for the recovery of any such damages
other state or territory and upon it being made to appear
Court in which any proceeding has been instituted in this
as herein provided that any such suit has also been
commenced, or is being maintained in any other state or terri-
contrary to the intent of this Act, it shall be the duty of
Court to set down for hearing and try and determine the
pending in this territory as expeditiously as
upon which short notice to the other party thereto or
attorneys as the Court may direct; and for the purpose of

trying the same said Court shall have the power to compel the parties thereto to plead or answer on such short day as it shall determine and in event the same is triable by jury it shall be the duty of the Court, upon motion, to change the venue thereof to such county in said district as in the opinion of the Court will afford an opportunity for the most speedy hearing; but if such action is not triable by jury, then the court shall immediately proceed to try and determine the same, giving such reasonable notice as it may determine, to the parties or their attorneys at any place in the territory which the Court may designate, and witnesses may be compelled by subpoena to attend at such place personally, from any part of the territory, and testify as at present, at such time and place. The institution of any such suit in any other state or territory shall be construed by the Court as a waiver upon the part of the party so instituting the same of the right of trial by jury in the case pending in the courts of this territory.

Sec. 4. Whenever it shall be made to appear to the District Court of this territory for the county in which petitioner or plaintiff lives, by any petition filed under Section 3 hereof, or by a supplemental petition, or by any original complaint filed for that purpose, that petitioner or plaintiff feats or has good reason to fear that any other person is threatening or contemplating instituting suit in some other state or territory to recover damages against petitioner or plaintiff for personal injuries inflicted or death caused in this territory, or that he has already instituted and is then maintaining such a suit, it shall be the duty of the Court upon such bond as the Court may require being given, to issue its injunction, pendente lite restraining such suit in any court sitting in any other state or territory, and, at the final hearing, if such facts are found by the Court to be true, the Court shall make such injunction perpetual, and at the final hearing in all cases instituted under the provisions of Section 3 hereof, the party complained of in the petition shall be perpetually enjoined from further instituting or maintaining any suit or action to recover damages by reason of any of the matters or things set up in said petition.

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Sec. 5. This Act shall not only apply to cases in which the person or corporation against whom damages for personal injuries are claimed can not be duly served with process in this territory.

Sec. 6. Nothing herein contained shall be construed as in any way preventing any one in this territory claiming to have a right of action for any such damages, from compromising such claim.

Sec. 7. All Acts and parts of Acts and laws in conflict with this Act are hereby repealed and this Act shall be in effect from and after its passage. (Rec. 147-150.)

The accident in question occurred in the Territory of New Mexico and it was not claimed that any suit or proceeding had ever been instituted by the plaintiff or any one for him in any of the courts of New Mexico on the cause of action herein and as required by the legislative Act above set out; Sowers did give to the railway company the notice required by the Act (Rec. 67), but no other or further steps were taken by the defendant in error to enforce any right he had, as required under and by the Act.

SPECIFICATION OF ERRORS.

I.

The Court of Civil Appeals erred in holding that the statutes of the Territory of New Mexico as pleaded by the defendant on the trial of this cause in bar of recovery did not control the rights of the parties herein and that same was not binding upon the courts in the State of Texas.

II.

The Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in failing and refusing to decide this case according to the statutes and laws of the Territory of New Mexico, which were in force and effect at the time of the accident

out of which this suit arose, it being admitted that this accident occurred in the Territory of New Mexico, and not in the State of Texas, and laws of the Territory of New Mexico which were in effect at the time of said accident and at the time of the trial of this cause having been properly plead and proved upon the trial of said cause.

III.

The District Court of El Paso County erred on the trial of this cause in failing and refusing to give Special Charge No. 1 requested by the defendant, which Special Charge was and is as follows:

"That, under the law of the Territory of New Mexico, pleaded and introduced in evidence, the plaintiff was required to first bring his suit in the Territory of New Mexico before instituting this suit, and as there is no testimony showing such fact, your verdict should be for the defendant."

And the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in failing and refusing to reverse the judgment rendered in the District Court of El Paso County, Texas, because of the failure and refusal of the judge of the District Court of El Paso County to give said Special Charge.

IV.

The Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in failing and refusing to sustain the second assignment of error of this plaintiff in error in that court, wherein plaintiff in error complained of the action of the trial court in sustaining the demurrer of the plaintiff to the defendant's plea as set forth in its amended answer in which the laws of the Territory of New Mexico were pleaded as a defense to this action, and when it was shown and admitted that no suit had been brought by the plaintiff in the Territory of New Mexico as provided by the laws of said territory, said laws having been pleaded and introduced in evidence.

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VI.

The Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas erred in failing and refusing to give full faith and credit to the public statutes and laws of the Territory of New Mexico and in holding that said laws were not binding upon the courts in the State of Texas. The Court of Civil Appeals as aforesaid had no right to pass upon the validity of the laws of a sister jurisdiction. At best, the Court of Civil Appeals at San Antonio had only the right to interpret these statutes, and said court had just as much right to declare an Act of the Parliament of the British Empire unconstitutional and invalid as it had to pass upon the validity of a statute of the Territory of New Mexico pleaded in defense in this cause by the plaintiff in error. This case ought to have been tried according to the laws of the Territory of New Mexico, and it was the duty of the Court trying this cause to enforce those laws when same were properly called to its attention, and failure to do so was a denial of one of the rights guaranteed by Section 1, Article 4, of the Constitution of the United States.

BRIEF OF ARGUMENT

While there are six assignments of error, they but present in different form the question whether the parties to this suit should have had their rights determined under the laws of the Territory of New Mexico, and whether the courts of Texas in refusing to determine this case according to the statute of New Mexico, gave to the plaintiff in error the right to present his case in this court. It is admitted that this accident occurred in the Territory of New Mexico; that there were ample courts in said Territory, wherein the rights of the parties hereto could be adjudicated; that the General Assembly of New Mexico had passed the Act (*supra*), and that the same was in full force and effect at the time this cause of action accrued and at the time of the trial of this case, and it can be readily seen by reference to the pleadings, charge of the lower court, judgment rendered and opinion of the Court of Civil Appeals, that the rules of pro-

cedure and statute of the Territory of New Mexico were entirely ignored.

It shall be our contention that the statute of the Territory of New Mexico herein interposed was a valid and subsisting law at the time of the occurrences stated, and as such, was entitled to respect and consideration in the courts of a sister jurisdiction, and that the failure to so respect said statute was a violation of Article 4, Section 1, of the Constitution of the United States. We do not know that any direct attack upon the Statute of New Mexico is to be made further than may be inferred from the exceptions presented in the trial court and sustained.

It is provided by the organic law of New Mexico that all laws of the Territory shall be submitted to Congress, *and if disapproved*, shall be null and void. There is no evidence to indicate the disapproval by Congress of the Act in question, and indeed, we assume it to be judicially known that there has been no such disapproval, and because whereof it is our contention that the Act in question is a valid and subsisting law. It is to be noted that it is the *disapproval* of Congress which would render the Act void, and in the absence of this disapproval it may be assumed that the Act is legal and binding. In the case of Coulter vs. Stafford, 56 Fed. Rep. 564, Judge Hawley had under consideration a statute of the Territory of Washington, in the organic law of which territory there appears the same clause as in the organic law of the Territory of New Mexico, relative to the disapproval thereof by Congress, and in passing upon the question now under consideration the judge used the following language:

"We are of the opinion that in order to impeach the validity of any Act under this section, the party claiming it to be invalid would have to show that it had been submitted to Congress and that it had been disapproved. In the absence of any evidence or specific finding, or any action upon the part of Congress, we are bound to presume that the laws of Washington Territory are of binding force and effect."

In the case of Hornbuckle vs. Toombs, 18 Wall. 535, Mr. Justice Bradley used the following language

"Whenever Congress has proceeded to organize a government

for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the Territorial Assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature; and the jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the state courts—a very different jurisdiction from that exercised by the Circuit and District Courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction."

* * * *

"From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is, that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves."

In Miners Bank vs. State of Iowa, 12 Howard, p. 6, the following, among other things, was decided:

"Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves; whilst, for considerations equally strong, they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventative or remedy till Congress

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V.

The Court of Civil Appeals of the Fourth Supreme Judicial District of Texas erred in overruling and failing to sustain plaintiff in error's fourteenth assignment of error in that court, which was and is as follows:

"The Court erred in sustaining plaintiff's exception to the defendant's answer, which exception was filed in this cause on the eleventh day of December, 1905, for the reason that the defendant company did not own any line of railway in the State of Texas; that it did own and operate a line of railway in the Territory of New Mexico; that it did have agents in the said Territory of New Mexico upon whom service may be had; that it was shown that the courts held regular sessions in the said Territory of New Mexico, and in the county where said accident occurred, which said courts had jurisdiction of the said matters and things involved in this controversy; that it had not been shown and was not pleaded that the plaintiff ever brought his suit in the Territory of New Mexico within the time fixed by the Act pleaded by defendant, or within any other time; because the Act of the Legislature pleaded by the defendant was not a local or special law, but a general law; that the said Act so pleaded was not contrary to the organic law of said territory, because said Act so pleaded by the defendant was not contrary to the seventeenth provision of the organic law of the Territory of New Mexico; because said Act so pleaded was not in violation of the fifth Amendment of the Constitution of the United States, or any other amendment; because said Act of the legislature was not void, was not class legislation, but was and had been held to be such legislation as the legislature of the Territory of New Mexico might have enacted; because none of the reasons stated by the plaintiff in said exception, or any subdivision of said exception, were valid, nor should said exception, or any subdivision thereof, have been sustained."

Wherefore the Court erred in sustaining the plaintiff's said exception to the defendant's answer setting forth the law of New Mexico as pleaded in said answer.

if not in session, could be convened, or, when in session must have awaited its possibly procrastinated aid."

Wherefore we assume that the Act under consideration will be held to be valid until specifically disapproved by Congress, and that the only question now for determination is, whether it should have been applied in the case at bar.

In the case of Southern Pacific Company vs. Schoer, 114 Fed. Rep., 470, Judge Sanborn decided that each of the states has the unquestioned right to regulate the relations between employers and employes, and to fix by legislative enactment the liabilities of the former for the negligence of the latter. Indeed, it seems to be well understood that the relations existing between employers and employes are matters for state regulation, as applied to business within the State, and especially, that the action of the proper authority within a state in fixing the relations, reciprocal rights and duties of those engaged in business, is a matter which is not subject to inquiry *by the courts of other states*. The very Act of the Territory of New Mexico under consideration was held to be within the proper discretion of the Legislative Assembly of that territory by the same Court of Appeals in Texas which affirmed the judgment in the present case. Buttron vs. E. P. & N. E. R'y Co., 15 Tex. Court Reporter 329.

While actions for personal injuries may be transitory in character, yet it is a well known rule that wherever determined they shall be tried according to the laws of the country wherein the act was committed; provided, of course, such laws are properly called to the attention of the court trying the case. The defendant in error had no right of action created by the laws of Texas. He secured no greater right by coming to Texas to litigate than he would have secured had he remained in the Territory of New Mexico, and in the case at bar he secured no right beyond the territorial limits of New Mexico; and it was the duty of the courts of Texas in trying this case, to apply the laws of the Territory of New Mexico, *together with all the restrictions imposed*.

In the case of Swisher vs. A. T. & S. F. R'y Co., 90 Pacific Reporter 812, the Supreme Court of Kansas had under consideration the same statute that is involved in this case. That was an action filed in Kansas for injuries resulting in death, which occurred in New Mexico. The Act of New Mexico was plead in bar in that case, and after citation of authorities on the subject the contention of the railway company was sustained. We direct the attention of the Court to the following, which appears in the opinion: "It does not seem reasonable that a cause of action created by the law of one state should be materially enlarged when the beneficiary moves across the state line and appeals to the court of another state to enforce his imported right. The rule of state comity does not contemplate such a result. We think that an action in this State for a wrongful death occasioned in another state or territory is incumbered with all the limitations imposed by the statutes of the state where the right of action was created. In this case the notice provided by Section 1 of the Act of 1903 is an essential part of the cause of action, and until such notice is given, no cause or right of action exists either in New Mexico or elsewhere."

In the case of Poff vs. New England Telephone & Telegraph Company, 55 Atlantic Reporter, 891, the Supreme Court of New Hampshire had under consideration a similar question, and we quote the following from the opinion:

"The limitation of time in the statute relates not merely to the remedy, but to the right which the statute creates. The right granted an administrator to sue in such a case is not an absolute right. It is not like the common law right of making contracts. In the absence of the statute, it does not exist. Hence its scope and effect must be determined as questions of legislative intention. The plaintiff's right to maintain this suit is not greater than the Legislature intended it should be. The language of the special provisions applicable leave no room to doubt that the right and the correlative liability thereby established were made conditional upon the bringing of the suit 'at any time within two years after the death of the deceased party and not afterwards.' The cause of action is conditional. If the condition is not observed, the parties stand with respect to the

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wrongful act as though the statute had not been enacted. "It must be evident that, as this action is brought under a special law, and is maintainable solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it, and the condition precedent to the maintenance of the action at all."

To like effect is the opinion of the Supreme Court of South Carolina in Dennis vs. Atlantic Coast Line Railroad, 49 Southeastern Reporter 869. In that case a statute of limitations of the State of North Carolina required that suits for injuries resulting in death should be brought within twelve months, whereas, under the laws of the State of South Corolina, the period of limitation was two years. In an action brought in South Carolina, growing out of an accident which occurred in North Carolina, the Court held that the North Carolina statute should prevail.

We also refer to the case of Rodman vs. Missouri Pacific R'y Co., 70 Pacific Reporter, 642.

The reasoning of this Court in "The Harrisburg" 119 U. S., 199, sustains the contention as well as the reasoning of the Supreme Court of Kansas in the Swisher case, supra. We note the following from the opinion in that case:

"The statutes create a new legal liability with the right to a suit for its enforcement, provided, the suit is brought within twelve months and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts could be maintained if brought or found after the expiration of the year; and it would seem to be clear that if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes and the limitations of the remedy are, therefore, to be created as limitations of the right."

Coyne vs. Southern Pacific Company, 155 Fed. Rep., 683, involved an action to recover damages for personal injuries, instituted by a citizen of Utah in the courts of Utah, on account of an injury received in the State of Nevada. The State of Nevada had passed a statute on the subject of personal injuries, the second section of which was as follows:

"Such liability, however, where not discharged by agreement and settlement, shall exist only in so far as the same shall be ascertained and adjudged by a state or federal court of competent jurisdiction in this state in an action brought for that purpose by the person injured."

In passing upon the question, Judge Marshall used the following language:

"By Section 4, not only conflicting statutes, but inconsistent laws, are repealed. Thereafter the plaintiff's right was no less an exclusively statutory right because the same facts would have created a right under prior common law principles. Commonwealth vs. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Commonwealth vs. Cooley, 10 Pick. (Mass.), 37; Gorham vs. Luckett, 6 B. Mon. (Ky.), 146; Gwinner vs. Lehigh, etc., R. R. Co. 55 (Pa.), 126. Viewed as a statutory right, it must be admitted that the state creating the right can attach to it any valid condition, so that when the right is sought to be vindicated in another state or in a foreign country, the condition must also be applied. Hamilton vs. R. R. Co. 39 Kan. 56, 18 Pac. 57; Slater vs. Mexican Nat. R. R. Co. 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Minor's Conflict of Laws, Sec. 202. As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith vs. Condry, 1 How. U. S. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. Slater vs. Mexican Nat. R. R. Co., supra. In Nonce vs. Richmond & D. R. Co., (C. C.), 33 Fed. at page 435, it is said:

"A cause of action arising under a statute may be made local by the express terms of the statute; and, if the provisions of such law are not complied with, the right thus conferred may be extinguished, and can not be enforced in the courts of another state."

"At common law such an action as this was transitory and a suit for trespass to real property local; but this common law distinction is not removed from legislative control, and, when the place of trial is attached to the right as a condition, I know of no authority to recognize the right and ignore the condition, unless it is violative of some superior law. As the statute in question does not discriminate against federal courts, there is no basis for questioning its validity."

It is to be noted that Section 1 of the Statute of Nevada under discussion created a liability for personal injuries growing out of the wrongful act of any person or corporation. Section 2 expressly declared that this liability shall exist only where same is ascertained and adjudged by a court of competent jurisdiction *in that state*. Section 4 repealed all laws in conflict with the act. This statute, therefore, is in effect nothing more nor less than the statute of New Mexico invoked in this case. The New Mexico statute creates a liability, if the cause of action is asserted within a given time, in some court in New Mexico. It repeals all inconsistent laws, and denies liability, either at common law or under statute, if the right is not asserted in accordance with the Act. The Nevada statute, by the first section thereof, creates the right, by its second section declares the same shall exist only in case the right is asserted in some competent court in that State, and Section 4 repeals all inconsistent laws, hence, in principle there is no difference between the two statutes.

Please note that Judge Marshall expressly decided that a cause of action arising under a statute may be made local by the express terms of the statute, and that if the provisions of the law are not complied with, the right conferred may be extinguished and cannot be enforced in the courts of another state. We recognize that this is not the opinion of a court of last resort, yet the argument appears to be forceful and to be supported by the authorities cited by the learned judge.

In this connection we desire to quote the following from the case of Davis vs. N. Y. & N. E. R. R. Co., 143 Mass. 301.

It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the state, or who resorts to another state for his

remedy, if jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred; and, as by the law of Massachusetts it is required that a person injured while travelling upon a railroad must prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care, and as jurisdiction may be obtained by an attachment of property of the defendant in another state, the plaintiff might relieve himself of the necessity of proving his own due care, if, by the law of the state to which he may resort, such proof is not required, and thus put upon the railroad company a higher responsibility than is imposed by the state in which it was performing its business. In a similar way, if a traveller upon a steam or horse railroad could not recover in this state for an injury done by carelessness in transporting him, because he was travelling upon Sunday, in violation of the laws of the state, he might, unless the law prescribed in this state is to govern in any state where laws forbidding travelling on Sunday did not exist, if jurisdiction could there be obtained over the defendant or its property. Where an injury occurs in another state, which would be the foundation of an action at common law, and it is known that the general law of that state is the common law, it may be inferred that the transaction is governed by its rules as here applied, in the absence of evidence to the contrary; but, when it is shown to be otherwise, the law of the state where the injury occurs is to be regarded. It is a general principle, that, in order to maintain an action of tort founded upon an injury to person and property, the act which is the cause of the injury and the foundation of the action must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought. Le Forest vs. Tolman, 117 Mass. 109, and case cited. It must be for the State of Connecticut to prescribe when, and under what circumstances a cause of action shall arise against a corporation which operates a railway within its limits by reason of an act done by it. It may provide that, for an injury done by its carelessness, there shall be no cause of action on behalf of the injured party, but punishment by indictment only, or it may give to such injured person a cause of action, and for the same injury make the corporation responsible, by indictment or other proceeding, for a fine or damage, which shall go to the state, to relatives of the injured party, or to any

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other persons named. Commonwealth vs. Metropolitan Railroad, 107 Mass. 236.

* * * *

"When no such cause of action now exists in the state where the injury occurred, it is not easy to see how it can exist here, especially when, in such state, another cause of action, growing out of the same facts, has been substituted for it. This would be to subject the defendant to two liabilities, one existing by the law of the state in which jurisdiction over person or property was obtained, but in which the accident did not occur; and the other imposed by the law of the State where it did occur, and where the defendant had its residence; while in either state the liability there imposed would be the only one to which the defendant could by its law be subjected."

This doctrine is again affirmed by the same court in Higgins vs. Central & N. E. R. R. Co., 155 Mass. 176.

In the case of Nonce vs. R. & D. R. R. Co., 33 Fed. Rep. on page 435, the Court said:

"The act complained of must be a tort, at common law or by statute, in the place where committed, for the merits of a cause of action are determined by the laws of the place where it arose. *A cause of action arising under a statute may be made local by the express terms of the statute, and if the provisions of such law are not complied with the rights thus conferred may be extinguished and cannot be enforced in the courts of another state.*"

The Supreme Court of Kansas, in the case of Pendleton vs. Hannibal & St. Jo. R. R. Co., 18 Pac. Rep., 57, in a suit for injuries resulting in death filed in the State of Kansas, while the accident occurred in Missouri, in which the laws regulating the remedy as well as the right in such cases, were different in Missouri from what they were in Kansas, said:

"There is no conflict in the decided cases upon the point that so far as the right of action is concerned it must stand, if at all, upon the statute of the state where the injury occurred and not of the one where the redress is sought. The statute of Missouri provides who may bring the action, and the time and conditions within which it must be instituted, and *compliance with these requirements is essential to the maintenance of the action.*"

We likewise call the Court's attention to the case of Burns vs. Grand Rapids R'y Co., 15 N. E., 230, wherein this question was discussed at length by the Supreme Court of Indiana and the

conclusion reached in accordance with our contention. However, a question of similar import has been decided by this Court. In Slater vs. Mexican Nat. R. R. Co., 194 U. S., 120, opinion rendered by Mr. Justice Holmes, it was said:

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction, Stewart vs. Baltimore & Ohio R. R., 168 U. S. 445. But when such a liability is enforced in a jurisdiction, foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout vs. Wood, 1 Blackf. Ind. 71; Dennick vs. Railroad Co., 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, Smith vs. Condry, I How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In Northern Pacific R. R. vs. Babcock, 154 U. S. 190, 199, an action was brought in the District Court of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

We believe that the laws of the jurisdiction wherein men bind themselves are a proper part of each and every contract thus made. Sowers was charged with knowledge of the laws of the Territory of New Mexico at the time he entered into his contract of employment and, at the time he was performing the service in New Mexico he presumably knew his rights and

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liabilities. The railway company knew the same. The statutes affecting their status were necessarily a part of their contract, and they were of necessity accepted by both. This statute notified Mr. Sowers what he must do in case of accident, if resort was had to the Courts. This statute told him that he would have no cause of action whatever, either at common law or under any statute of the Territory of New Mexico, for injuries received, unless he did certain things. That was the law of the place where the work was performed and where the accident occurred, and it cannot be said that this man acquired a different right by stepping across the line into Texas and filing suit. Can it be said that the courts in Texas could confer upon him an immunity which he was not entitled to and could not receive under the laws of the place where the accident occurred? We think not. Indeed, Sowers did not have the same or an equal right in Texas, because it was wholly competent for the legislature of New Mexico to deny the right of recovery altogether for injuries received in the manner that this man was injured, and if it was competent for it to deny altogether, then it was surely competent to fix the rights and remedies, one to the other, and to prescribe such rules and regulations, which may be stated in the nature of conditions precedent, as are to fix the status of the master and the servant, and it is not within the sphere of the courts of Texas, or any other state, to pass upon the validity of that statute, and assuredly it was not competent for the courts of this state to declare it unconstitutional.

We understand the rule to be settled that the courts in one state shall not pass upon the validity of the laws of a sister state. At best, such courts may only interpret laws of other jurisdictions, and in interpreting such laws the construction placed thereon by the court of last resort in the state where the statute is operative shall be adopted. In the absence of such an interpretation, the courts of another state may construe, but never pass upon the question of validity, as such laws are presumed to be valid until declared otherwise by some proper court either in that state or in a federal jurisdiction. The case at bar did not involve the question of the interpretation of the statute

of New Mexico; there was nothing to interpret; it was plain and unambiguous. It was the simple province of the Texas court to give full faith and credit to that act, yet it is to be noted that the Court of Civil Appeals, in passing upon it, did not mince matters, but simply declared the act inoperative and void.

We quote the following from the opinion of Associate Justice Fly, of the Court of Civil Appeals, Rec. p. 154:

"By the enactment of the law in question, however, the Territory of New Mexico has issued a legislative injunction against any one injured by the negligence of another within its bounds, regardless of his place of domicile or the equities that may be involved. There is no law or precedent for it, and it is an assumption of authority that will not be tolerated in the courts of any state."

Likewise the following appears in his opinion:

"The jurisdiction of our courts must and will be prescribed by the constitutional and legislative authority of our own state, and not by that of any other state. A law attempting such interference is null and void and as such does not come within the constitutional provision aforementioned. There is nothing in the contention that a void statute is binding on the courts of Texas until the territorial courts declare the law invalid."

The theory of legislative injunction mentioned by Judge Fly is indeed far-fetched. As we have assumed to show to the court that it is the exclusive province of each State to fix the rights and liabilities for injuries to servants at the hands of masters, and to prescribe the exclusive limits within which such rights may be asserted, and as the various legislatures may within their proper sphere wholly deny such right of action, when such right has been clearly defined, it is not within the power of the court of another state to disregard or enlarge it. The State of Texas, through its legislature, might declare absolutely that there should be no liability on such cause of action as is asserted by Sowers in this case, and will it be said that it would be within the province of some court in New Mexico to declare that statute unconstitutional? We take the negative on that proposition, and assert, as said above, that it would be the duty of the courts in New Mexico to give full faith and credit to that act and not to pass upon the question of its validity, unless such validity

had been passed upon by a court of last resort in the State of Texas.

On the proposition that the Territory of New Mexico had the right to enact this statute, the opinion in McLean vs. Denver & Rio Grande R. R., 203 U. S. 38, is strongly pursuasive, if not directly in point.

The duty of courts in one state to give full faith and credit to the decrees and legislative acts of other states has frequently been before this court, and we do not know of a break in the decisions, all being to the effect that this provision of the Constitution is mandatory.

In Martin vs. Pittsburg & Lake Erie R. R., 203 U. S. 284, the injured party was a railway postal clerk, and while engaged in that duty was injured in the State of Pennsylvania. Suit was filed in the State of Ohio. The defendant plead a statute of the State of Pennsylvania, in effect that plaintiff had only the same right of action as though he were an employe of the railway company. The courts in Ohio followed the Pennsylvania statute, and denied recovery, and in the opinion by Mr. Justice White, the action of the Ohio court was sustained.

Hancock National Bank vs. Farnum, 176 U. S. 640, grew out of a suit filed in the Circuit Court of the United States for the District of Kansas. Afterward suit was filed on the judgment in that case in the common pleas division of the Supreme Court of Rhode Island. A demurrer was sustained to the declaration and judgment entered for the defendant. Writ of error was prosecuted to this court, based upon the action of the court in Rhode Island in failing to give full faith and credit to the Kansas judgment, and in an opinion by Mr. Justice Brewer the judgment of the state court of Rhode Island was reversed, because of its failure to give full faith and credit to the Kansas judgment.

"The constitution declares that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that Congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States

as they have by law or usage in the courts of the state from which they are taken."

See also Great Western Telegraph Company vs. Purdy, 162 U. S. 329. Bauholzer vs. New York Life Insurance Company, 178, U. S. 402. Cole vs. Cunningham, 133 U. S. 107.

The case of Huntington vs. Attrill, 146 U. S. 657, grew out of the failure and refusal of the Circuit Court of Baltimore City to give full faith and credit to a judgment rendered in the Supreme Court of the State of New York. The opinion is quite lengthy, and goes extensively into the subject under consideration. We refer to it because of the basic principle announced in accordance with our contention.

It has been held that the territories are included in this constitutional provision. Mockey vs. Coxe, 18 How. 100; Mehlin vs. Ice, 56 Fed. 127; Quesenbach vs. Wagner, 41 Minn. 108.

Pennsylvania R'y Co., vs. Hughes, 191 U. S. 477, involved the shipment of a horse from a point in New York to a point in Pennsylvania. The contract of shipment contained a clause limiting the carrier's liability to a stipulated value. The horse was injured in Pennsylvania, and the limiting clause in the contract was plead in bar of recovery. Under the rule in the State of New York the carrier had the right to so limit its liability, but not so in Pennsylvania. The Courts in Pennsylvania followed the rule in that state, based upon the theory that the accident happened in that state and that the rule of liability ought to be determined by the laws of that state. This contention was sustained in an opinion rendered by Mr. Justice Day.

The question when this court will entertain a writ of error based upon the failure and refusal of a state court to give full faith and credit to the public acts of another state, was considered in Baltimore & Potomac R. R. vs. Hopkins, 130 U. S. 210, and it was there determined that the validity of a statute is drawn in question when the power to enact it is fairly open to denial, and in this case the Court of Civil Appeals of Texas denied to the Legislative Assembly of New Mexico the right to enact the statute in question, in so far as it may affect this cause of action.

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We cannot close our citation of authorities without reference to the opinion of the Supreme Court of Texas in C. R. I. & P. R'y Co. vs. Thompson, 16 Tex. Court Rep., 979. It was a suit for personal injuries filed in the State of Texas on a cause of action which arose in Oklahoma Territory. The plaintiff in his application for employment obligated himself that he would within a given time after receiving injuries give notice of the claim in a certain way, and this application concluded with the following statement:

"And my failure to give notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries."

This application was signed in the Indian Territory, and the railway company plead its provisions in bar of any recovery. The plaintiff attempted to defeat the provisions of this contract by pleading the statute of the State of Texas denying the right of railway companies to limit by contract the time within which suit might be filed. We quote the following significant statement from the opinion of Justice Williams:

"And if we could hold that the statute did apply, we do not see how that would enable the courts of this state to render a judgment for plaintiff as upon a cause of action which had accrued to him under the laws of Oklahoma, for according to those laws he had none which he can assert. It is only by virtue of the principles of comity that the plaintiff, a citizen of the Indian Territory, can ask our courts to enforce a transitory cause of action which he claims accrued to him in Oklahoma, and this does not entitle him to have a portion of the law of that Territory affecting his claim disregarded because it differs to ours. His right of recovery must be given by the law of the place where his injury occurred, whether that law be ascertained by proof, or presumption in the absence of proof."

Mexican National R'y Co., vs. Jackson, 89 Tex. 107; Railway vs. McCormick, 71 Tex. 660; Railway vs. Richards, 68 Tex. 375. The principle decided in these cases, in the last analysis, is simply that it is the duty of the courts of a state, in passing upon a cause of action arising in a different jurisdiction, to give full faith and credit to the laws of that jurisdiction. Sowers under the laws of the jurisdiction wherein the accident occurred, had

no cause of action in Texas; that right was specifically denied. We simply ask that the courts in Texas, under any and all circumstances, be required to give full faith and credit to the laws of another jurisdiction, when applicable and duly presented. The law in question was applicable; it was seasonably presented; the jurisdiction of this court has been invoked because of the failure of the courts in Texas to follow the Constitution and Statutes of the United States.

Respectfully submitted,

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE.

Counsel for Plaintiff in Error, The Atchison, Topeka & Santa Fe R'y Company.

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Office Supreme Court, U. S.
FILED
OCT 19 1907
JAMES H. McKENNEY,
Clerk

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 364.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE A. SOWERS, DEFENDANT IN ERROR.

REPLY OF PLAINTIFF IN ERROR TO MOTION PRESENTED BY DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 286.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

GEORGE A. SOWERS,
Defendant in Error.

REPLY OF PLAINTIFF IN ERROR TO MOTION PRESENTED BY DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, and files the following reply to defendant in error's motion to dismiss the writ of error herein, and in this behalf has thought it proper to briefly state the issue and the history of this case as same may affect the question at bar.

Defendant in error filed suit in the District Court of El Paso County, Texas, for personal injuries sustained by him while in the service of the plaintiff in error as a brakeman, it being shown that at the time of said accident the services were being performed in the Territory of New Mexico, and it is admitted that this accident occurred in defendant's railway yards at Gallup, in the Territory of New Mexico, on or about the 30th day of April, 1905. No part of the service in which Mr. Sowers was engaged was performed in the State of Texas.

Plaintiff in error in its answer, filed in the above cause, stated several defenses, and among others, plead that this accident happened in the Territory of New Mexico and as bar to recovery set up the Act of the Thirty-fifth Legislative Assembly of the Territory of New Mexico passed on March 11th, 1903, and known as Chapter 33 thereof. Printed Record, 6-7.

To this answer, defendant in error filed exceptions, Printed Record, 11, which exceptions were by the trial court sustained and plaintiff in error was not permitted to interpose the defense of the laws ot the Territory of New Mexico in bar of recovery. Printed Record, 13.

The plaintiff in error on the trial of the case asked a special instruction, embracing the laws of the Territory of New Mexico, in bar of recovery, which charge the court refused to give, Printed Record, 21, and after judgment had been rendered in favor of defendant in error, plaintiff in error filed its motion for a new trial, assigning error, among other things, on the refusal of the trial court to give its special charge in this behalf, as well as to the action of the trial court in sustaining exceptions to plaintiff in error's plea in this behalf. See 10th ground of amended motion for new trial, Printed Record, 27, and 14th ground thereof, Printed Record, 28.

An appeal was prosecuted by plaintiff in error to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, and error was assigned to the action of the trial court in sustaining defendant in error's exception to plaintiff in error's answer, and to the action of the trial court in refusing to give the special charge above referred to. See 10th assignment of error, Printed Record, 32, and 14th assignment of error, Printed Record, 33, and 15th assignment of error, Printed Record, 33. And in printed brief plaintiff in error presented these assignments, and made the propositions that are here contended for. See supplemental record. All of these assignments were by the Court of Civil Appeals overruled and judgment of the District Court of El Paso County was in all things affirmed. Printed Record, 155.

Plaintiff in error, within proper time, filed its motion for rehearing, setting up as error the action of the Court of Civil Appeals in overruling these assignments and the propositions thereunder, which

were to the effect that it was the duty of the courts in Texas, under the laws and constitution of the United States, to give full faith and credit to the public acts and records of the Territory of New Mexico, and that the action of the court in failing so to do was a refusal to give such full faith and credit as is and was required under the constitution and laws of the United States, and in support of this motion for rehearing, plaintiff in error filed a written argument, fully setting up its defense under the constitution and laws of the United States. See Supplementary Record filed herein. This motion for rehearing was likewise by the Court of Civil Appeals overruled, Printed Record, 162. Whereupon, plaintiff in error filed its petition for writ of error in the Supreme Court of Texas, Printed Record, 162, alleging and setting up, among others, as error the action of the Court of Civil Appeals in overruling the assignments above referred to and its failure to give full faith and credit to the laws of the Territory of New Mexico. This application for writ of error was by the Supreme Court denied, Printed Record, 202. Whereupon and seasonably, plaintiff in error presented its application for writ of error to the Supreme Court of the United States, same being addressed to the Judges of the Court of Civil Appeals, in and for the Fourth Supreme Judicial District of Texas, under authority of Bacon vs. Texas, 163 U S. 207, and Stanley vs. Schwalby, 162 U. S. 255, Printed Record, 203, and the assignments of error accompanying said petition for writ of error distinctly present the question as to the denial by the courts in Texas of the rights guaranteed under the constitution of the United States and Act of Congress supporting same and the failure of said courts to give that full faith and credit to the public Acts of the Territory of New Mexico as is required by the supreme law of the land.

The defendant in error has challenged the jurisdiction of this court in the premises in its motion to dismiss the writ of error and for the four reasons stated therein. We will assume that the primary ground of this motion is based upon the third section thereof to the effect that no federal question was involved in the opinion rendered by the Court of Civil Appeals. However, we have stated the history of this case to conclusively show that the defense of the statute laws of the Territory of New Mexico have at all stages in the progress

of this case been presented and insisted upon by the plaintiff in error, and if we are correct in the conclusion that it was the duty of the courts in Texas, if they entertained this cause at all, to determine same according to the laws of the jurisdiction wherein the accident occurred, then there would seem to be no escape from the conclusion that this court has jurisdiction. Article 4, Section 1, of the Constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof, and the Congress of the United States has further met the requirements of this provision and prescribed the mode of proof and so on. Revised Statutes of the United States, Section 905.

The act of the Territory of New Mexico relied upon by the plaintiff in error is set out in full in the Printed Record, page 147. The first section thereof provides, among other things, as follows: "Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this territory unless the person claiming damages therefor shall, within 90 days after such injuries shall have been inflicted, make and serve upon the person or corporation against whom the same is claimed, and at least 30 days before commencing suit to recover judgment therefor, an affidavit * * * * * and unless the person so claiming such damages shall, also, commence an action to recover the same within one year after such injuries occur in the District Court of this Territory, in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or in event such claim is asserted against a corporation in the county, in this territory, where such corporation has its principal place of business, and said suit after having been commenced, shall not be dismissed by plaintiff, unless by written consent of the defendant filed in the case or for good cause shown to the court, it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover

can exist for such injuries, except as herein otherwise provided." Other sections of this act do not affect the question at bar.

In so far as defendant in error's motion to dismiss is concerned, we do not understand that it is necessary or that it would be proper to discuss the question as to the right of the Territory of New Mexico to regulate the rights and liabilities as between the employer and employe as is done in this act. It is our understanding that the states have the undoubted right to regulate these conditions and fix the reciprocal rights and duties of those affected, and that the action of a proper authority in this behalf is not subject to inquiry by the courts of other states. Southern Pacific Co. *vs.* Schoer, 14 Federal, 467, and authorities there cited. Davis *vs.* New York & New England R. R., 143 Mass., 301. Higgins *vs.* Central New England R. R., 155 Mass., 176.

If we are right, therefore, in this conclusion, then the only questions for proper consideration at this time are:

1st. Did the courts in the State of Texas give full faith and credit to the public acts of the Territory of New Mexico, by the various judgments rendered herein? And if not:

2nd. Has such failure and refusal on the part of the courts in Texas given to the plaintiff in error the right to a writ of error to this court?

It is admitted that those provisions of the act of the Legislative Assembly of New Mexico above stated were not complied with by the defendant in error, and no such suit was ever filed in New Mexico as is required by that act. The only suit ever instituted, growing out of the accident complained of, was the one filed in the District Court of El Paso County, Texas, which is involved herein. It is also admitted that this suit could have been maintained in New Mexico, as required by the legislative act. While the cause of action asserted by defendant in error was transitory in character and might by virtue of the comity existing between the various states be filed in any state where jurisdiction could be obtained, we understand that without regard to where the suit is maintained, it must be tried according to the laws of the jurisdiction where the accident occurred, if those laws are properly brought to the attention of the court, and the act of the Assembly of New Mexico in question was offered

and introduced in evidence on the trial of this cause in the District Court of El Paso County, Texas, Printed Record, 147. While under the practice in this State this cause of action might be prosecuted at any place where the defendant may be found in this State, because of the comity existing between the states and territories, yet, as asserted above, it is our understanding of the rule of decision that when the laws of the Territory of New Mexico were properly brought to the attention of the trial court, it was its duty, under the Constitution of the United States, to hear and determine the cause in accordance with the laws of *that* jurisdiction. Such is the rule of decision in Texas with the qualification that, where the laws of the State where the accident occurred are materially different from the laws of this State, the courts here will not undertake to adjudicate the rights at all, but will dismiss the suit without a hearing upon the merits. Mexican National Ry. Co. *vs.* Jackson, 89 Texas, 107. St. Louis, Iron Mountain & Southern Ry. Co. *vs.* McCormick, 71 Texas, 660. Texas & Pacific Ry. Co. *vs.* Richards, 68 Texas, 375. Thomas *vs.* Western Union Tel. Co., 2nd T. C. R., 133. C. R. I. & P. Ry. Co. *vs.* Thompson, 16 T. C. R., 979. It goes without saying that the primary question decided in each of these cases was necessarily that it was the duty of the court trying the case to determine the issue according to the laws of the jurisdiction wherein the cause of action arose, and that if the rule of decision in that jurisdiction was materially different from the practice and rule of decision in this State, the cause of action could not be maintained here at all, and in such of those cases cited above as went to final judgment the laws of the place where the cause of action arose were strictly adhered to. We might cite authorities from numerous other states to the same effect, but for the purposes of this question have deemed the above sufficient.

The courts in Texas in determining the questions at bar in each of those cases was simply following the mandate contained in Article 4, Section 1, of the Constitution of the United States and the act of Congress on the same subject.

By an examination of the court's charge in the case at bar, you will discover that the court endeavored to submit this case to the jury under the rules of the common law as to fellow servants, and in

doing so, the court was not submitting the case in accordance with the laws of the State of Texas, but in accordance with the laws of the Territory of New Mexico on the same subject. In other words, the court followed one law in the Territory of New Mexico and refused to follow another. It may be asked, was it necessary for the courts in Texas to take into consideration the act of the Legislature of New Mexico in determining this case, or could the case have been properly decided on some other issue and at the same time given full faith and credit to the act in question? We answer that under the express terms of the act of the Legislative Assembly of New Mexico in question, it was the duty of the trial court to give the special charge asked by the defendant, which was a peremptory charge. In other words, when this statute was brought to the attention of the court and it was admitted by the defendant in error that he had not complied with that statute, the court should have dismissed the case, because under the express terms of this statute, the defendant in error had no cause of action. We must, of course, assume for the purposes of this motion that the Legislature of New Mexico had the right to enact the legislation in question, and if so, by its express terms, there was a denial of liability, a denial of any right of recovery under the circumstances of this case. There was and is no question of fact in issue. The court simply ignored this statute, even to the extent of sustaining an exception to the same before evidence was offered on the subject.

The Court of Civil Appeals at San Antonio in overruling these assignments, seems to have taken the position that the Legislature of New Mexico could not fix the jurisdiction of the courts in Texas, and that such was the only effect of this statute. It will not be contended that the Legislature of New Mexico could fix the jurisdiction of the courts of Texas as an original proposition, but there is something more than a jurisdictional question involved in this controversy. The statute in question affects the right of recovery itself. Our contention is that this man had no cause of action at all, and if he had no cause of action, the question of jurisdiction is of no importance; if the act in question means what it says, and assuredly it is capable of but one construction, then it has fixed by its terms the condition under which the right of action itself shall exist, and

unless those conditions which are conditions precedent are complied with, then there is no right of action itself.

It is asserted that Mr. Sowers was a resident of Arizona, but we fail to see how that can affect the question for the reason that the physical facts demonstrated and the evidence showed that at the time of the accident the man was actually in New Mexico, and by engaging in service in that territory he tacitly submitted himself to the jurisdiction of the laws therein. He became subject to all of her laws, liable to all the penalties imposed by any breach of duty and entitled to all the privileges and immunities guaranteed to every other man in the territory. He had this, and no more. We think that any man who engages in a particular service in any community necessarily makes the laws of that community a part of his contract of employment. He will be charged with knowledge thereof, and because this man claimed Arizona as a home put him on no better footing as to an act done in the Territory of New Mexico than if he had been born and raised within that territory.

It is said that this court will not entertain a writ of error where there is simply involved the question of the construction of a statute, and this we concede, and if nothing more than a construction of the act in question was involved by the decisions of the courts in Texas, then we would not have the right to sue out this writ of error, but the question of a construction of statutes is not involved in this case, but the issue reaches further and beyond, and involves, by reason of the judgments rendered, the validity of the statute, and if we are right in this contention, the fact that the courts by the express terms of the various judgments rendered have declared the statute invalid in this controversy gives us the rights we now assert. There was but one construction of which the statute in question was susceptible. It was either valid or invalid. If valid, the courts in this state should have respected it. There was nothing to construe. The only issue for determination is: shall the statute be followed or not?

There are numerous decisions, all holding in effect that it is the duty of the courts of one state to give full faith and credit to the public acts of another, and that the failure to do so raises a federal question, which gives this court jurisdiction to pass on the subject as an original proposition.

The case of Martin *vs.* Pittsburg & Lake Erie R. R., 203 U. S., 284, was where the injured party was a railway postal clerk, and while engaged in that duty was injured in the State of Pennsylvania. Suit was filed in the State of Ohio. The defendant plead a law of the State of Pennsylvania which it contended relieved it from responsibility. The courts in Ohio followed the Pennsylvania statute, gave full faith and credit to the same and denied recovery, and in a final opinion by Mr. Justice White, the action of the Ohio court in this behalf was sustained.

The case of Hancock National Bank *vs.* Farnum, 176 U. S., 640, grew out of a suit filed in the Circuit Court of the United States for the District of Kansas. Afterwards suit was filed on the judgment rendered in that case in the common pleas division of the Supreme Court of Rhode Island. A demurrer was sustained to the declaration and judgment entered for the defendant. Writ of error was prosecuted to this court, based upon the action of the court in Rhode Island in failing to give full faith and credit to the Kansas judgment, and in an opinion by Mr. Justice Brewer the jurisdiction was sustained and the judgment of the State Court of Rhode Island was reversed, because of its failure to give full faith and credit as required by the statute, and from this opinion we quote the following:

"The Constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that Congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Such is the Congressional declaration of the effect to be given to the records and judicial proceedings of one State in the courts of every other State. In other words, the local effect must be recognized everywhere through the United States.

To the same effect is the holding of the Court in Great Western Telegraph Co. against Purdy, 162 U. S., 329.

The case of Huntington *vs.* Attrill, 146 U. S., 657, grew out of the failure and refusal of the Circuit Court of Baltimore City to

give full faith and credit to a judgment rendered in the Supreme Court of the State of New York. The opinion is quite lengthy, and in our judgment goes extensively into the subject under discussion. We refer to it because of the basic principle announced in accordance with our contention herein.

We likewise refer to the case of Bauholzer *vs.* New York Life Insurance Co., 178 U. S., 402, and Cole *vs.* Cunningham, 133 U. S., 107. It has been held that the territories are included in this constitutional provision. Mockey *vs.* Coxe, 18 How., 100. Mehlin *vs.* Ice, 56 Fed. 12: Quesenbach *vs.* Wagner, 41 Minn., 108.

The question as to when this court will entertain a writ of error based on the failure and refusal of a State court to give full faith and credit to the public acts of another State was considered by this court in Baltimore & Potomac R. R. *vs.* Hopkins, 130 U. S., 210, and it was there determined that the validity of a statute is drawn in question when the power to enact it is fairly open to denial, and in the case at bar, the Court of Civil Appeals in Texas denied to the Legislative Assembly of New Mexico the right to enact the statute in question in so far as it may affect this cause of action.

We quote the following from the opinion of Associate Justice Fly, of the Court of Civil Appeals, in passing upon this case:

"By the enactment of the law in question, however, the Territory of New Mexico has issued a legislative injunction against any one injured by the negligence of another within its bounds, regardless of his place of domicile or the equities that may be involved. There is no law or precedent for it, and it is an assumption of authority that will not be tolerated in the courts of any State."

Likewise the following appears in his opinion:

"The jurisdiction of our courts must and will be prescribed by the constitutional and legislative authority of our own State, and not by that of any other State. A law attempting such interference is null and void and as such does not come within the constitutional provision afore mentioned. There is nothing in the contention that a void statute is binding on the courts of Texas until the territorial courts declare the law invalid."

So that it clearly appears that the Court of Appeals in Texas has not dodged the question, but has openly declared the statute under

consideration void in so far as same may be a defense in this suit, although it was admitted that the plaintiff was working in New Mexico at the time of the accident and that the entire cause of action, if any, accrued in the Territory of New Mexico.

Hence, as said before, there is no question involved in this case as to the construction of the New Mexico statute, but only are we to determine, on final hearing, the validity therof, and as only its validity can be involved in this transaction, it would seem to us to be clear that the jurisdiction of this court has attached. Glenn *vs.* Garth, 147 U. S., 360.

We call the court's attention also to the case of Pennsylvania Ry. Co. *vs.* Hughes, 191 U. S., 477, which was a case wherein a horse was shipped from a point in New York to a point in Pennsylvania. The contract of shipment contained a clause limiting the carrier's liability to a stipulated value. The horse was injured in Pennsylvania and the limited clause in the contract was plead in bar of recovery. Under the rule in the State of New York the carrier had the right to so limit its liability, but not so in Pennsylvania. The courts in Pennsylvania followed the rule in that State, based upon the theory that the accident happened in that State and that the rule of liability ought to be determined by the laws of that State. This contention was sustained in an opinion rendered by Mr. Justice Day.

The Court of Civil Appeals in its opinion herein does not seem to question the authority of the laws of New Mexico so far as they apply to its own affairs, but it does attempt to repudiate those laws when they attempt to regulate the affairs of other states. We are at a loss to understand just how this case does in any way attempt to regulate the affairs of the courts in Texas. It must be remembered that this man Sowers *had no inherent right to maintain this suit in Texas at all.* The courts in Texas were under no obligation to him. The railway company had committed no wrong as to him within the State of Texas. The covenants of the contract between the two were being wholly performed within another jurisdiction and each of them was charged with knowledge that respective rights during the performance of the service in New Mexico would be determined by the laws of that territory. Hence this man could not come to the State of Texas and demand as a matter of right the

adjudication of this grievance, and it was merely by reason of what is known as comity that the suit was ever entertained here, and when entertained here, *each party to the controversy only had and secured such rights as were guaranteed to them under the laws of the Territory of New Mexico.* Mr. Sowers added nothing to the liability of the railway company by maintaining this suit in Texas. He secured no greater right than the laws of New Mexico gave him, and if the laws of New Mexico gave him no right, he was charged with knowing that fact, and of course must take the consequences. Now, under the laws of New Mexico could any judgment have been rendered in this action in favor of the defendant in error? We say no, and for this reason we believe that the jurisdiction of this court has attached. The defendant in error could maintain only such suit in Texas as the laws of New Mexico gave to him, but nothing more.

We, therefore, respectfully submit that a federal question, one arising under the laws and constitution of the United States, is presented in this record; that the judgments of the courts in Texas have been such as to deny full faith and credit to the legislative act of the General Assembly of New Mexico, that these judgments have been contrary to the provisions of Article 905 of the Revised Statutes of the United States, and as it appears from the record that plaintiff in error has seasonably presented these questions and has been denied the right guaranteed to it under the statute and laws of the United States, the motion of the defendant in error to dismiss the writ of error ought to be denied.

Respectfully submitted,
J. W. TERRY,
A. B. BROWN,
GARDINER LATHROP,
Attorneys for Plaintiff in Error, Atchison, Topeka & Santa Fe Ry. Co.

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 286.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

GEORGE A. SOWERS, Defendant in Error.

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

Now comes George A. Sowers, Defendant in Error, and moves the Court to dismiss the Writ of Error in this case, for the following reasons, and each of them, to-wit:

First: Because this court has no jurisdiction of this case, for the reason, that the judgment of the Court of Civil Appeals,

for the Fourth Supreme Judicial District of the State of Texas, is a final judgment.

Second: Because no federal question was raised in the lower court, and neither does the opinion of the Court of Civil Appeals of the State of Texas, involve any federal question.

Third: Because this court has no jurisdiction to review the decision of a state court, upon the ground that, in such decision, error intervened in the construction of a statute of the Territory of New Mexico.

Fourth: Because, although in the opinion of this Court, the record may show that this Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question, on which the jurisdiction depends, is so frivolous as not to need further argument.

GEO. E. WALLACE,
Counsel for Defendant in Error
for the Purpose of this Motion.

To J. W. Terry and A. H. Culwell, Attorneys for Plaintiff in Error:—

Gentlemen:—Please take notice, that on the 21st day of October, 1907, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for a decision of the court thereon. Annexed hereto is a copy of my brief, or argument, in support of said motion.

GEO. E. WALLACE,
Counsel for Defendant in Error
for the Purpose of this Motion.

BRIEF.

This suit was brought by Defendant in Error, who alleged that he resided at Winslow, Arizona, against the Plaintiff in Error, who owned and was operating a line of railway, extending into El Paso County, Texas. (Tr. of Rec. 2-3.)

On appeal, the Court of Civil Appeals of Texas affirmed the judgment of the trial court, and held that the statute of New Mexico, introduced by Plaintiff in Error, was not applicable to the facts of the case. (Tr. of Rec., 154.)

The Texas Supreme Court refused a writ of error, and thereby affirmed the decision of the Court of Civil Appeals. (Tr. of Rec., 202.)

Defendant in Error complied fully with the laws of the Territory of New Mexico, by serving on defendant's agent at Gallup, New Mexico, a notice in writing prior to the institution of this suit. (Tr. of Rec., 97-98.)

In the case of Glenn et al. vs. Garth et al., 147 U. S., 359-360, 37 L. Ed., 203, this court said:

"This Court has not jurisdiction to review the decision of state court, upon the ground that, in such decision, error intervened in the construction of a statute of another state."

The record in this case shows conclusively, that no federal question was raised in the trial court, or by assignment of error in the Court of Civil Appeals, nor was it necessary, in deciding said case, for the Court of Appeals to, in any manner, construe the statute of the Territory of New Mexico whereby a federal question, necessary to the decision of the case, was involved.

The jurisdiction of the Supreme Court, to examine into the correctness of judgments, given by state courts, is special and limited in its character, and is restricted to cases arising under paragraph 709, of the Revised Statutes.

There must be a federal question, within the terms of the above statute, to enable the Supreme Court to review the decision of a state court. Where a state court, confessedly, passed to judgment, without any suggestion that a federal question was presented for its determination, there can be no question for review by the Federal Supreme Court. Butler vs. Gage, 138 U. S., 61.

A real, and not fictitious, federal question is essential to the jurisdiction of the Supreme Court over judgments of a state court. Three classes of cases, only, are reviewed by the Supreme Court, on a writ of error from a state court, viz.:

(a) There must be drawn in question the validity of a treaty, or statute, or an authority exercised under, the United States, and the decision must have been against the claim to maintain which either was relied upon.

(b) Or there must be drawn in question a statute of, or an authority exercised under, a state, upon the grounds of repugnancy to the constitution, or a law, or treaty of the United States; and the decision must have been in favor of the validity of the state law or authority, in question.

(c) Or a right must have been claimed under the constitution, or law, or treaty, or by virtue of, a commission held, or an authority exercised by, the United States; and the decision must

have been against the right, so claimed. (Ins. Co. vs. Augusta, 93 U. S., 116.)

The construction of state statutes, relating to matters of practice and procedure in state courts, does not raise any question of federal law, which can be reviewed in the Supreme Court. (Shauer vs. Alterton, 151 U. S., 626.)

Plaintiff's cause of action was transitory in its nature, and could be enforced in any court, having jurisdiction of the parties.

Defendant in Error alleged that, at the time of his accident, as well as at the time of filing his suit in the District Court of El Paso County, Texas, he was a resident citizen of the Territory of Arizona, and not a citizen of the Territory of New Mexico. The Act of the Territory of New Mexico, relied on by the Plaintiff in Error, attempts to prohibit other states from exercising jurisdiction of transitory causes of action. (Tr. of Rec., 147-149.)

This provision of the act is void, and was held void, and not binding on the courts of Texas, by the Court of Civil Appeals. (Tr. of Rec., 154.)

In the case of Cole vs. Cunningham, 133 U. S., 107, 33 L. Ed., 542, a statute, similar to the one in question, was before this Court, and Chief Justice Fuller, passing on said question, said:

"The intention of Section 2, of Article 4, was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities, which the citi-

zens of the same state would be entitled to, under the like circumstances, *and this includes the right to institute actions.*"

We submit that the record in this case conclusively shows, that this Court has no jurisdiction to entertain the writ of error, for the reason, that there is no federal question involved. On the other hand, admitting that this Court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the question, on which the jurisdiction depends, is so frivolous as not to need further argument.

We respectfully ask that the writ of error be dismissed, or, that the case, on this hearing, be affirmed.

Respectfully submitted,

GEO. E. WALLACE,

Attorney for Defendant in Error.

We, the attorneys for the Atchison, Topeka & Santa Fe Railway Company, Plaintiff in Error, on this the 23d day of September, 1907, hereby acknowledge receipt of a copy of the foregoing motion, notice and argument, and waive service and notice of filing.

J. W. TERRY and A. H. CULWELL,

Attorneys for Plaintiff in Error, Atchison,

Topeka & Santa Fe Railway Co.

NO. 268

IN THE

SUPREME COURT OF THE UNITED STATES

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
Plaintiff in Error

v.

GEORGE A. SOWERS, Defendant in Error

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas

BRIEF FOR DEFENDANT IN ERROR

Defendant in Error adopts the statement of the case, as set out by Plaintiff in Error in its brief, and says that the same is substantially correct.

Plaintiff in Error has filed six Specifications of Error, each of which raises the question of whether or not the Supreme Court and the Court of Civil Appeals of the State of Texas were in Error in holding that the trial court properly assumed jurisdiction of this suit.

We contend that this court should sustain defendant in error's motion to dismiss or affirm, heretofore filed in this cause, together with brief and authorities relied upon to sustain the said motion; but in the event the court should decide to consider the questions at bar, we submit that the case should be affirmed on each of the propositions hereinafter submitted.

First. This being a transitory cause of action, and defendant in error having complied fully with the laws of New Mexico by giving the statutory notice, the courts of the State of Texas had the right to determine its own jurisdiction and that right is not subject to revision by the Supreme Court of the United States.

The case at bar was passed upon by our Court of Civil Appeals, who held that the trial court had jurisdiction to try and determine the questions involved; A. T. & S. F. Ry. Co. *v.* Sowers, 99 S. W., 192.

Plaintiff in error made application to the Texas Supreme Court for writ of error, which was in all things denied, thereby affirming the decision of the Court of Civil Appeals. This direct question was before the Supreme Court of the United States in the case of St. Louis I. M. S. R. Co. *v.* Taylor; opinion rendered May 8, 1908, and in that case the court, speaking through Mr. Justice Moody, said:

"The cause of action arose under the laws of the Territory and was enforced in the courts of Arkansas. The plaintiff in error contends that of such a case, triable as it was in the courts of the Territory, created by Congress, the courts of Arkansas have no jurisdiction. This contention does not present a fed-

eral question. Each state may, subject to the restriction of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside of its borders; Chambers *v.* Baltimore & O. R. Co., 207 U. S., ante, 34th, 28th Sup. Ct. Rep.

We have therefore no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. On that question the decision of that court is final."

We think this question purely one of jurisdiction of the Texas court, and as the court of the last resort of Texas has decided the question adversely to plaintiff in error, that decision is final and not reviewable by the Supreme Court of the United States.

Second. The Act of the Territory of New Mexico in question, having been submitted to the Congress of the United States and by it disapproved, said act is now and has been since its passage, void and of no force and effect.

The Organic Act Establishing the Territory of New Mexico; Compiled Laws of 1897, pps. 43-48, is as follows:

"That all laws, passed by the Legislative Assembly, and Governor, shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no force and effect."

At the last session of our Federal Congress, this statute in question was submitted for its approval, and was disapproved by Congress without a dissent-

ing vote; 35 Stat. L., Part 1, page 573. This law was branded by Mr. Clayton and other different members of Congress as being outrageous, as well as oppressive. Cong. Rec. 6259—60.

We submit that the minute this territorial act was disapproved by Congress, the law became not only a nullity at said time, but null and void from its inception, and as the same is not now the law of the Territory of New Mexico, it never was the law, and cannot be relied upon as a defense in this action.

Third. Because all that portion and part of the territorial law, which attempts to make it unlawful for plaintiff, or other person, to institute or maintain a transitory cause of action outside of the Territory of New Mexico, or in another state or territory, is unconstitutional and void, and is in violation of Section 2, Article 4, of the United States Constitution, as it deprives plaintiff, and all other persons affected by said act, of privileges and immunities, guaranteed by the Constitution of the United States and the law of the land.

In the case of Cole *v.* Cunningham, 133 U. S., 107; 33 L. Ed. 542, Chief Justice Fuller, on passing on a question similar to the one at bar said:

"The intention of Section 2, Article 4, was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, *and this includes the right to institute action.*"

In the case of Willis *v.* Mo. Pac., 61 Tex., 432, the Supreme Court of Texas said:

"Where action is transitory and is based on personal injuries, recognized as such by the universal law, the suit may be brought where the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong is inflicted."

In a more recent case of Blake *v.* McClung, 172 U. S., 239-256, this court said:

"The Constitution forbids only such legislation affecting citizens of the respective states, as will substantially or practically put a citizen of one state in a condition of alienage, when he is within, or when he removes to, another state, or when asserting in another state the rights that commonly appertain to those who are a part of the political community, known as the people of the United States, by and for whom the government of the Union was ordained and established."

In the case of Chambers *v.* Baltimore and O. Ry. Co., 207 U. S., 142, all the authorities bearing on this question were reviewed, and we think the opinion, taken as a whole, sustains our proposition.

Fourth. We submit that all that portion of the New Mexico Statute which requires suits to be brought in the *District Court of the Territory,* to the exclusion of the Federal Courts, and also to the exclusion of the minor courts, discriminates not only against the courts of other states and territories, but against the Federal courts themselves and that it is therefore unconstitutional and void.

Section 1 of said Article provides: "Hereafter there shall be no liability under either the common law or any statute of the territory, on the part of any person, * * * * unless the person so claiming such

damages shall have commenced an action to recover same, within one year after such injuries occurred, *in the District Court of this territory,* in and for the county of this territory where the claimant, or person against whom such claim is asserted, resides."

Under this portion of the law, none of the Federal Courts would have jurisdiction to try and determine a cause of action for personal injuries, arising in the territory, as the law distinctly says that the action shall be brought in the "District Courts of this Territory," and excludes not only the Federal Courts but all minor courts.

It may be possible that a law of this character could be drawn so as to make it valid; but where a law is enacted, which clearly shows that it was the suggestion of the railroads, and boldly discriminates against the Federal Courts, by attempting to take away the the rights of litigants to have the Federal Courts entertain jurisdiction of causes of action, both in states, as well in the territory, it is clearly a discrimination of the worst sort. Suppose in this case plaintiff had lived in Texas, and had filed this suit in the Federal Court at El Paso, as he would have had the right to do, the defendant being a citizen of Kansas; or suppose he had filed the suit in some Federal Court in New Mexico. This law, if valid, would have ousted the jurisdiction of those Federal Courts, as the same is mandatory in its requirements that suits shall be brought in the *Territorial District Court,* to the exclusion of all other courts, both State and Federal.

In passing upon the statute of Nevada, of a similar nature, Judge Marshall, in the Coyne case, 155 Fed., 684, said:

> "As the statute in question does not discriminate against Federal Courts, there is no basis for questioning its validity;"

evidently intending to convey the idea that if the Nevada statute in question had prohibited suits from being filed in the Federal Courts, either in Nevada or elsewhere, as does the New Mexico statute, he would have held said statute void.

Sections 7 and 17 of the Organic Act of the Territory of New Mexico are as follows:

"Section 7. That the legislative power of the territory shall extend to rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this Act."

"Section 17. That the Constitution and all laws of the United States, not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico, as elsewhere within the United States."

"Article 2871, Statutes of New Mexico:

"In all the courts in this territory the common law as recognized in the United States of America shall be the rule of practice and decision."

This question was under consideration by the Fourth Court of Civil Appeals of Texas, in the case of Ry. Co. *v.* Gutierre, 111 S. W., 159, in which Justice Fly said:

"This court has heretofore adverted to the provisions of this law, as being so unreasonable and outrageous as to deserve the condemnation of every civilized community and has refused to be governed by it; at least in its application to the citizens of other states, and that refusal has met with the approval of the Su-

preme Court of the State of Texas; Ry. Co. *v.* Sowers, 99 S. W., 190. We adhere to that decision and approve the action of the court in striking out that part of the act embodying its provision. Since that decision, and since the death for which damages are herein claimed occurred, the Congress of the United States has repealed the law in question, and few indeed will be found to regret its taking off."

We submit that no error has been shown and therefore ask that the case be affirmed.

Respectfully submitted,

WM. H. ROBESON,

GEO. E. WALLACE,

Counsel for Defendant in Error, Geo. A. Sowers.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

NO. 64

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
Plaintiff in Error

v.

GEORGE A. SOWERS, Defendant in Error

SUPPLEMENTAL BRIEF UPON MOTION TO DISMISS OR AFFIRM

In additions to the contentions made by appellee against the jurisdiction of this court to consider this case upon the writ of error, the following is submitted:

1. The State court did not hold the act of the Territory of New Mexico invalid except in so far as

that act attempted to invade the rights of the courts of Texas to determine their own jurisdiction. It is not denied that the courts of Texas had jurisdiction of transitory actions.

The plea setting up the statute of New Mexico in bar of claimant's right of recovery will be found on page 7 R. The court must not be confused as to the question involved in the State court by the statements found upon appellant's brief, that full faith and credit was not given to the statute of New Mexico.

This act will be found on page 147, etc., of the record.

The exceptions to this special plea will be found on page 11 of the record.

The order sustaining these exceptions will be found on page 13 of the record and it will be noted that the exceptions are sustained only in so far as they denied the authority of the legislature of New Mexico to determine the jurisdiction of the Texas court. In all other respects "due faith and credit" was given to the statutes of New Mexico, or rather, such statutes were not drawn in question, because the provisions of the statute, as to notice, had been complied with and the suit was brought in the Texas court within the limitation of time stated in the New Mexico statute.

The opinion of the Court of Civil Appeals of the State of Texas will be found on page 151 of the record. It was sought by appellant to have the Supreme Court of Texas review the case upon a writ of error to the Court of Civil Appeals, but the writ was denied. (P. 202 R.)

In the opinion of Judge Fly above referred to, it is evident that the Texas court gave "full faith and credit" to the statute of New Mexico and there was no violation of Section 1 of Article 4 of the Constitu-

tion of the United States. The Texas courts only construed the New Mexico statute and held that the legislature of New Mexico had not the power to deny to the courts of Texas their jurisdiction of transitory actions.

That the construction by one State of the statute of another does not raise a Federal question is a proposition too well settled to need discussion.

Indeed, Mr. Justice Holmes, when Chief Justice of the Supreme Court of Massachusetts, in the case of Woodward *v.* The Central Vermont Railroad (180 Mass., p. 599), expressly held that while it would no doubt be beyond the jurisdiction of a State court for any reason to declare a provision of the Constitution of any State void, with reference to *statutes*, the rule is otherwise. If the statute of a State is violative of its own constitution and the rights of citizens of other States are affected thereby, the courts of the States whose citizens are affected, will declare such statutes unconstitutional and void. Mr. Justice Holmes, in declaring this Vermont statute void, expressed regret that this declaration did not come from the Supreme Court of Vermont.

Again it may be said that where some of the provisions of the act were void and others valid, the illegal part can be eliminated without destroying the effectiveness of the act for the purpose intended; the illegal part may be eliminated and the valid part may be held effective and operative. (40 S. P., 747; 45 Fla., 163.)

The decision of the Texas court was in effect that while the statute might be valid, as to the requirement that claimants should give notice and bring suit within a year, it was void and inoperative as to its power to control the jurisdiction of the Texas

courts, as this was in derogation of the authority and jurisdiction of such courts.

We insist that under this construction given the New Mexico statute by the Texas courts, such courts did not fail to give "full faith and credit" to the laws of New Mexico as provided in Section 1, Article 4 of the Constitution.

ACT OF THE TERRITORY OF NEW MEXICO VOID

We insist, however, that the whole statute of New Mexico relied upon by defendants was in reality void and of no force and effect. The act is in contravention of Section 1891 of the Revised Statutes, which is as follows:

> "The Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereafter organized, as elsewhere in the United States."

It has been held that this section extends the common law over the Territories. (People *v.* Green, 1 Utah, p. 13.)

Again, it is insisted that the act of the legislature of the Territory of New Mexico is in contravention of Sections 7 and 17 of the organic act of the Territory and repeals Article 2871 of the statutes of New Mexico.

Section 17 of the organic act and Section 1891, R. S., are identical, and by their terms extended the common law with all its rights and privileges over the said Territory.

One of the rights incident thereto was that of maintaining a transitory action for personal injuries, such as are complained of in this case. This right given by Secton 1891, R. S., and Section 17 of the organic act of New Mexico is sought to be destroyed by the act pleaded. This act subsequently, when submitted to Congress, was by Congress disapproved. (35 Stat. L., Part 1, p. 573.)

While in Miners' Bank *v.* Iowa, 12 How., p. 1, it was held that—

> "Congress, in creating the Territorial government, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers until expressly sanctioned by themselves. * * * A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for, etc."

it is submitted that this reasoning applies to legislation properly initiated under the organic act of the Territory. Once we have a legislative enactment of the territorial legislature approved by Congress its repeal can be effected only by the approval of Congress of the repealing act. Otherwise, the laws of a territory, once passed and approved by Congress would be subject to every whim of the legislative body, and the purposes of Congress absolutely destroyed, temporarily at least, by the repealing statute.

The statute in question repealing Section 17 of the organic act and violative of Section 1891, R. S., could have been made effective only by the approval thereof by Congress. Its disapproval rendered the act void *ab initio.*

Again, it is submitted that the act was void because it sought to oust the State and even the Federal courts of their common law jurisdiction of transitory actions.

The act, in attempting to limit the forum in which actions for personal injuries might be brought, provided among other things, that it should be instituted

> "In the district court of this Territory (N. M.), in and for the county of this Territory where the claimant or the person against whom such claim is asserted, resides, or in event such claim is asserted against a corporation, in the county of this Territory where such a corporation has its principal place of business. * * *"

This suit in the State court of Texas, even though the act had been valid, is not within its prohibition, as it is shown that claimant resided in Arizona and the corporation against whom suit was brought was a citizen of Kansas. There is nothing in the record to show that the Atchison, Topeka and Santa Fe Ry. Co. had its principal place of business in New Mexico. This court will take judicial notice, from the records of the Interstate Commerce Commission, that the said railway company merely passed through the Territory of New Mexico, and that its agents were merely local and in no sense is it shown by the record or from the information afforded by the records of the Interstate Commerce Commission that their "principal place of business" was in any county of that Territory.

The Civil Court of Appeals of Texas could have held that this action was properly brought in the State court of Texas, as it did not fall within either

of the classes above named. If the case could have been determined by the State court of Texas upon a non-Federal ground, then this court, even though it has jurisdiction by the writ of error, should not disturb the verdict and judgment of the State court.

It is further insisted that the said Territorial act is violative of the provisions of Chapter 818, 24th Stat. L. (p. 170), in that—

1. It attempts to regulate the practice in courts of justice of the Territory, and

2. It provides for change of venue in civil and criminal cases.

The above chapter expressly denies to Territories the right and power to pass certain measures in their legislative bodies, among them being the two above named.

The whole theory of the judicial procedure of New Mexico under the organic act and the laws of the Territory, as to actions for personal injuries, is overturned by this Chapter 33 of the acts of the legislative assembly of New Mexico. (See p. 147 R.)

By Section 3 of the above act it is made mandatory upon the court, upon motion, to change the venue "to such county in the district as will, in the opinion of the court, afford an opportunity for the most speedy hearing."

The undue haste invoked by this provision of the statute was with reference to cases where the liability was incurred in the Territory of New Mexico and where suit was brought without the Territory and where the unusual right was given to the defendant to file his petition or declaration in the district court invoking this right and bring the injured party into court and have him then and there set up his claim

for such injuries. It is doubtful if in all legislation such a statute as this will be found.

The act goes even further than this by a provision for injunction proceedings against any litigant who invokes the jrisdiction of any court other than that designated in the act for the determination of his rights for personal injuries.

This attempted legislation is clearly within the prohibition of the provisions of Chapter 818, 24th Stat L. (p. 170), relating to attempts to regulate practice in courts of justice and to provide for changes of venue in civil and criminal cases within the Territories.

JURISDICTION OF THE SUPREME COURT

It is thought, however, that none of the questions hereinbefore discussed will be necessary for consideration in the case at bar, because of a want of jurisdiction on the part of this court to consider the case upon the writ of error to the Civil Court of Appeals of Texas.

It is fundamental that this court will first determine its own jurisdiction and in the determination of such jurisdiction, in cases brought to this court by a writ of error to a State court, one or more of the grounds of Section 709 R. S. (The Judiciary act) must exist. (Miners' Bank *v.* Iowa, 12 Howard, 375.)

The validity of the statute drawn in question against which validity the State court of Texas held, as claimed by appellant (to which proposition we do not assent), was an act of the territorial Assembly of New Mexico and not a statute of a State.

The statute of a territory is not the statute of a State, nor is it an act of Congress or a statute of

the United States within the meaning of Section 709 R. S., and the Supreme Court of the United States has no authority to review the decisions of a State court that holds that the law of a territory is not repugnant to the Constitution of the United States.

In Scott *v.* Jones, 5 How., p. 243, it was expressly held that in order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its Constitution and laws.

If public bodies not duly organized or admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached either by power of the Union to put down insurrections or by the ordinary penal laws of the States and Territories within which those bodies are situated and acting.

But their measures are not examinable on a writ of error. They are not a State and cannot pass statutes in the meaning of the judicial act.

In Messenger *v.* Mason, 10 Wall., p. 510, this court again held that no jurisdiction was given to this court by the judiciary act to cases where, in the State court, there was drawn in question the validity of the statute of a Territory. The court says:

> "One difficulty in bringing the case within the 25th section of the judiciary act is that it makes no provision for the reexamination of a judgment in a State court, which upholds the validity of a statute of a Territory in contravention of the Constitution. It applies only to the case where is drawn in question the validity of a statute of or authority exercised under any State."

In Miners' Bank *v.* Iowa, 12 How., 375, the court held that where a bank was chartered and its charter repealed by the legislature of a Territory, the question of the validity of the repealing act cannot be brought before this court under the 25th section of the judiciary act.

The power of review is confined by that section to certain laws passed by *States* and does not extend to those passed by *Territories.*

That the courts will preserve and assert their own jurisdiction is quite well settled.

In Nonce *v.* the R. & D. R. R., 33 Fed. Rep., p. 435, it is stated:

> "The law is well settled by numerous decisions in England and America that an action for a tort to the person or to personal property, or to reputation, recognized as injuries at the common law, can be maintained wherever the wrong doer is found, without regard to the place where the cause of action originated. (Moston *v.* Fabrigas, 1 Smith. Lead. Cases, 1027; Bernhart *v.* Green, 3 Sawy., 233; Dennick *v.* R. R., 103 U. S., p. 11; Cooley, on Torts, 470.)

In Dennick *v.* R. R. Co., Ibid., p. 18, Mr. Justice Miller stated:

> "The action in the present case (the suit being an action for personal injuries) is in the nature of a trespass to the person,always held to be transitory and the venue immaterial. The local court in New York and the Circuit Court of the United States for the northern district were competent to try such a case when the parties were properly before it." (McKenna *v.* Fisk, 1 Howard, p. 241, and other authorities.)

In the case of Smythe *v.* Ames, 159 U. S., p. 467, it is stated:

> "The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts, that what it enacts in the form of law, or what it authorizes its agents to do, inconsistent with the fundamental law, is in opposition to the theory of our Constitution, as the duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no rights secured by the supreme law of the land are impaired or destroyed by legislation."

In the case of Hyde against Stone (20 How., p. 125), it is stated:

> "* * * This court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States, can not be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial powers. * * * They can not abrogate their authority in any case in favor of any jurisdiction."

Again in the case of Chicot County against Sherwood (148 U. S.), where the statute of Arkansas attempted to determine the jurisdiction of suits against counties by prescribing that such claim should be presented to the county court for allowance or rejection, and providing appeals from the decisions in these county courts, approving the decision in Hyde against Stone, Ibid., this court said:

"The jurisdiction of the Federal courts is not to be defeated by such State legislation as this; * * * the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which its jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of any jurisdiction. This principle has been steadily adhered to by this court."

In this connection, see also Lincoln *v.* Luning (103 U. S., 529; Cowles *v.* Mercer, 7 Wall.)

We therefore submit,

First. That this court has no jurisdiction to entertain this case and the writ of error should be dismissed.

Second. If the court has jurisdiction, then we submit that there was no error in the judgment of the State court of Texas, because the statute of New Mexico relied upon was in contravention of the organic act of the Territory and of Section 1891 of the Revised Statutes and of Chapter 818, 24 Stat. L. (p. 170.)

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